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SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

No. 715.

RAMAPO WATER COMPANY,
Appellant,

against

CITY OF NEW YORK and CHARLES STRAUSS, CHARLES N. CHADWICK, and JOHN F. GALVIN, individually and as members of the Board of Water Supply of said City of New York,
Appellees.

Appeal from District Court of the United States for the Southern District of New York.

BRIEF FOR APPELLANT.

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APPEAL PRINTING COMPANY, New York.

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APPEAL FROM DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT.

Statement of the Case.

This is an appeal by the plaintiff from a final decree dismissing a bill in equity for want of jurisdiction, and is taken directly to this Court under Section 238 of the Judicial Code.

The suit was brought to enjoin a continuing interference with, injury to, and trespass upon, the property, rights, and franchises of the plaintiff, upon the ground that the acts of the defendants

constituting such interference, injury, and trespass, are being done under color of authority of State laws and amount to an impairment of the obligations of the plaintiff's contracts with the State of New York and a taking of the plaintiff's property without due process of law.

The parties to the suit are all citizens of the State of New York and the jurisdiction of the District Court was invoked upon the ground that the suit arises under the Constitution and laws of the United States (Bill, Pars. First and Thirty-second).

The defendants appeared generally and answered the bill and then made a motion to dismiss the bill for want of jurisdiction upon the ground that it appears on the face of the bill that "the suit does not involve any question arising under the Constitution or laws of the United States."

The District Court granted the motion and entered a final decree dismissing the bill for want of jurisdiction. The plaintiff appeals from that decree, and the District Court has certified the question as to its jurisdiction as follows: *Does the bill of complaint in this suit set forth a cause of action arising under the Constitution of the United States so as to give this (the District) Court jurisdiction of this suit notwithstanding the lack of diversity of citizenship?*

Whether or not the suit is really one arising under the Constitution of the United States must be determined by the averments of the bill itself (*Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S., 65; *Lovell* v. *Newman*, 227 U. S., 412; *The Fair* v. *Kohler Die Co.*, 228 U. S., 22). The defendants' answer must therefore be disregarded, except in so far as it may support the allegations of the bill (*Vicksburg Case, supra*, at p. 83).

Averments of the Bill.

The averments of the bill of complaint may be stated briefly as follows:

The plaintiff was incorporated under the laws of the State of New York in 1887, for the objects and purposes of accumulating, storing, conducting, selling, furnishing and supplying water for mining, domestic, manufacturing, municipal, and agricultural purposes, to cities, to other corporations, and to persons that might lawfully contract therefor. It paid to the State an organization tax of $3,125. This incorporation was effected under general laws of the State, including particularly Chapter 40 of the Laws of 1848, Chapter 85 of the Laws of 1880, and Chapter 472 of the Laws of 1881; and by virtue of this incorporation the plaintiff was granted the right to acquire, take, hold, lease and convey lands, waters, and water power suitable for its corporate purposes; the right to exercise the State's power of eminent domain; the right to acquire title to land and water for its corporate purposes in the manner specified and required by the General Railroad Act of 1850 (N. Y. Laws, 1850, Ch. 140); the right to lay pipes for the purpose of conducting water for the purpose of its business under any of the navigable waters of the State of New York; and the right to contract with municipalities, including the City of New York, and with private corporations, to furnish water for any of the purposes specified in its certificate of incorporation (Bill, Par. Fifth; Ans., Par. V; Laws 1848, Ch. 40; Laws 1880, Ch. 85; Laws 1881, Ch. 572).*

*Inasmuch as the answer admits that these rights were granted to the plaintiff by its incorporation, we have deemed it unnecessary to quote the laws in full in this brief.

The State's grant of these rights and powers was DULY ACCEPTED by the plaintiff (Bill, Par. Sixth), and upon the faith thereof the plaintiff PERFORMED A VAST AMOUNT OF WORK AND EXPENDED A VAST SUM OF MONEY. It investigated and located available sources of water supply, which of itself was an undertaking of great magnitude; devised plans for accumulating water, conducting it to market, and selling it; and partially executed its plans by surveying the watersheds and filing maps of the lands and waters which it proposed to occupy (Bill, Par. Seventh).

When this work had been in progress for some two years, the Legislature of New York undertook a general revision of the corporation laws of the State and in the course of this revision, on June 7, 1890, the above-mentioned laws under which the plaintiff was incorporated were repealed. This repeal gave rise (whether rightly or wrongly it is not material now to consider) to doubt and uncertainty with respect to the legal status of the plaintiff, particularly with respect to whether or not the repealing acts were valid and if valid whether they affected the rights and powers of the plaintiff; and as a result of this doubt and uncertainty the work and plans of the plaintiff were greatly hindered, delayed and impeded (Bill, Pars. Eighth, Tenth).

In 1895 this doubt and uncertainty were removed by the enactment of Chapter 985 of the New York laws of that year (Par. Tenth). This statute, which is quoted in full as Exhibit C to the Bill, provides, just as the old general statutes had provided, that the plaintiff might acquire lands and waters for its corporate purposes in the same manner specified and required by the Act of April 2, 1850 (Laws 1850,

Ch. 140, known as General Railroad Act), and also, in substance and effect, that the plaintiff should have the other rights, powers, privileges, and franchises which had been previously granted to the plaintiff by virtue of its incorporation under the old general laws which had been repealed in 1890.

The plaintiff DULY ACCEPTED said Chapter 985, and after it became a law the plaintiff, IN RELIANCE UPON ITS PROVISIONS AND UPON THE FAITH OF ITS GRANT OF RIGHTS AND POWERS, continued its prosecution of the great project which it had conceived—a project which, preceding the engineering feats of to-day, was amazingly bold and daring in conception, yet which subsequent events have proved to be the best, most feasible, most useful, most practicable, that can be devised. For four years the plaintiff had its engineers and surveyors in the Catskill Mountains exploring their creeks and watersheds, measuring the waters, surveying the lands, locating dam-sites, designing reservoirs, and locating routes by which the pure and wholesome waters of these mountain streams might be made to supply the existing need of the metropolitan district for additional sources of water supply. As a result of these activities, the plaintiff formulated a plan for accumulating the waters of the Esopus, Schoharie, Rondout, and Catskill creeks, and their adjacent watersheds, by means of storage reservoirs, and for conducting those waters by means of aqueducts to the City of New York in order that they might there be used for domestic and municipal purposes; and in partial execution of this plan, the plaintiff, between 1895 and 1899, made and filed in various County Clerks' offices, as provided by the statute, upwards of one hundred maps

of the route adopted and lands and waters selected and to be taken and utilized by it in carrying out its said plan. These maps covered approximately one thousand square miles of land and water, including substantially the whole of the drainage areas of Esopus, Schoharie, Catskill and Roundout creeks, and embraced all the routes, lands and waters necessary to be acquired, occupied, and used in order to carry out the plaintiff's said plan and design and make the same effective (Bill, Pars. Eleventh to Fourteenth). In addition to the filing of these maps, the plaintiff obtained a large number of options and contracts for the purchase of upwards of 7,000 acres of land at the price of over $240,000, which land was to be acquired and used by the plaintiff in carrying out its plan aforesaid (Bill, Par. Fifteenth). *The doing of all these things necessarily involved the employment of skilled engineers, surveyors, draftsmen, and other employees, and the expenditure of large sums of money, and necessarily consumed a large amount of time and labor* (Bill, Par. Sixteenth).

The bill expressly avers that the grant of the above-mentioned rights, powers, privileges and franchises to the plaintiff *constitutes a contract between the State of New York and the plaintiff; that said rights and franchises were of great value and constituted property; that the obligations of said contract cannot be impaired; and that the plaintiff cannot be deprived of said property without due process of law* (Bill, Pars. 5th, 9th and 11th). The bill further expressly avers:

> "Seventeenth. By its incorporation and organization aforesaid and by making and filing the maps hereinabove referred to, the plaintiff

acquired and became possessed of a vested right and franchise to construct and maintain, upon the lands and waters covered by and designated on said maps, reservoirs, dams, aqueducts, and other appurtenances of a system of water supply; to accumulate, store, conduct, sell, furnish and supply, for the purposes and to the persons and corporations specified in its certificate of incorporation, the waters contained in and to be derived from the watersheds, lands, streams, lakes and ponds covered by and designated on said maps; and to otherwise use the lands, streams, lakes, and ponds so covered by and designated on said maps for the accomplishment of the plaintiff's corporate objects and purposes and the prosecution of its business; which said right and franchise of the plaintiff was and is exclusive as to all other persons and corporations and legally and equitably free from the interference of any person or corporation; and from and after the time of the filing of said maps, the lands, streams, lakes, and ponds covered by and designated on said maps were and ever since have been and now are legally and equitably subject to the plaintiff's said franchise. Said right and franchise of the plaintiff was granted to it by the State of New York under and by virtue of the plaintiff's contract with said State, and *said right and franchise was and is a contract right and a right of property, in the possession and use and enjoyment of which the plaintiff was and is entitled to and claims the protection of the Constitution of the United States and the amendments thereof.*"

In 1898 the plaintiff made an offer to supply the City of New York with water from the watersheds, lakes, streams, and ponds designated on its said maps. Negotiations with respect to this offer and its examination and consideration by the City

authorities continued until November, 1899, when the City deferred action on the offer for three months (Bill, Par. 19th). The City was at that time in need of a new and additional supply of water and was without either the legal authority or the financial ability to construct an adequate system to supply said need (Bill, Par. 20th). But that large political question of municipal ownership began to be agitated, and for five years, from 1900 to 1905, the City authorities, for the purpose as announced by them of enabling them to determine whether they should accept the plaintiff's offer, carried on various elaborate and extensive investigations into the available sources of water supply for the City, and into the ways and means by which the City might best obtain the water needed by it, and during all said time the plaintiff's offer remained pending before them unacted upon (Bill, Par. 21st).

The net result of these elaborate investigations was *a demonstration that the best and most available sources of water supply for the City of New York were the identical sources already selected and appropriated by the plaintiff*, viz., the watersheds of the Esopus, Schoharie, Catskill and Rondout creeks in the Catskill Mountains, and that the best method of procuring such supply was the method devised by the plaintiff. But the advocates of municipal ownership had prevailed, and the City authorities set about obtaining authority and means to supply its own water. With the obvious intention, if not with the declared purpose of attempting to clear the way for the City's seizure of these valuable sources of water supply, the Act of 1895, by which the plaintiff's rights and franchises had been confirmed and secured to it,

was repealed by Chapter 122 of the Laws of 1901 (Bill, Par. 22nd). The existence of a deliberate scheme and design to destroy the plaintiff's rights, oust it of its franchises, and usurp its property, is further manifested by the fact that concurrently with the above investigations and the repeal of the Act of 1895, the City procured authority to incur indebtedness for the construction of its own system of water supply and, as stated above, applied from time to the State Legislature for legislation that would enable the City to construct such a system (Bill, Par. 22nd).

The City obtained its desired legislation in 1905. In that year the Legislature enacted the statutes under color of which the defendants are doing the acts herein complained of. Those statutes are Chapters 723 and 724 of the Laws of 1905, and became laws of the State on June 3, 1905.

Chapter 724 is An Act to provide for an additional supply of pure and wholesome water for the City of New York, the acquisition of lands, the construction of the necessary reservoirs, dams, aqueducts, &c., for that purpose, and the appointment of a Board or Commission to attain these objects. The general scheme of the act is, that the Mayor of the City should appoint a Board of Water Supply, which Board should ascertain the best available sources of water supply and report to the City's Board of Estimate and Apportionment with recommendations as to what action should be taken, so that the two Boards might determine from what sources and in what manner in the City might best secure an additional supply of pure and wholesome water; and that after the general plan of the project had been thus approved and determined the Board of Water Supply should acquire

the necessary lands and waters for the City and then proceed to construct the necessary dams, reservoirs, aqueducts, etc., in accordance with the plans, the mode of procedure for acquiring land being specifically set forth in the act in detail. *The statute does not specify what sources of water supply shall be utilized by the City nor what particular lands or waters it shall or may acquire;* and it was expressly provided that the City should have no power to acquire, take, or condemn lands under the statute unless maps and plans covering the work be submitted to and approved by the State Water Supply Commission (Bill, Pars. 23rd and 24th; Laws 1905, Ch. 724, Sec. 46).

The State Water Supply Commission here referred to is the Commission established by the other statute mentioned above (Laws 1905, Ch. 723). That Commission was established to pass upon applications of municipal corporations for the approval of maps and plans for new or additional sources of water supply, and was given power to approve, modify, or reject any such application (Bill, Par. 24th).

Shortly after the enactment of these statutes the City's Board of Water Supply was appointed, the present members thereof being the individuals named as defendants in this suit (Bill, Par. 25th). This Board submitted a report and detailed maps of a plan for a new system of water supply, and the Board of Estimate and Apportionment approved the same (Bill, Par. 26th). These plans, with certain subsequent modifications, were thereafter approved by the State Water Supply Commission (Bill, Par. 27th), and during the years 1907 to 1913, inclusive, the defendants instituted numerous proceedings and took

other steps for the acquisition of the lands and waters necessary to carry out said plans, which proceedings and other steps are alleged to have been taken in purported and attempted compliance with and under color of an authority claimed to be contained in said statutes and the decisions of the State Water Supply Commission (Bill, Par. 26th).

These maps and plans of the City provide for the acquisition of large quantities of land and water in the watersheds of the Esopus, Catskill, Schoharie, and Rondout creeks, the erection of dams and reservoirs for accumulating and storing those waters, and the construction of an aqueduct for conducting those waters to the City of New York. *The lands and waters so proposed to be utilized by the City are the same lands—the same sources of supply—designated on the maps filed by the plaintiff;* and the plans of the City for accumulating, storing, and conducting said waters are similar to and practically identical with the plans previously made and designed by the plaintiff for that purpose, so that *the execution of said plans of the City will necessarily involve the appropriation, use, and occupation by the City of the very lands and waters which the plaintiff proposed to occupy and use in the execution of its plans* (Bill, Par. 28th). Thus, under color of legislative authority, the City is doing precisely the same thing that the Legislature had previously authorized the plaintiff to do, and is doing it in the same way and by utilizing the same sources that the plaintiff proposed to use. *A balder attempt to effect an actual transfer of the property of one person to another by legislative action without compensation can scarcely be imagined.*

After setting forth these facts, the bill alleges

that, acting under color of State authority, the defendants have entered and are now trespassing upon the lands, streams, lakes, and ponds designated on the plaintiff's maps, and have commenced and threaten to continue and complete the erection of dams, reservoirs, aqueducts, and other appurtenances thereon, and to convey said waters to the City of New York, and there use such waters for municipal and other purposes, all in violation of the plaintiff's rights; that if the defendants complete the erection of those structures and so convey and utilize said waters, it will be impossible for the plaintiff to take advantage of or use said lands and waters and its rights and franchises will be thereby impaired, injured, damaged, and destroyed; that unless the defendants be enjoined they will complete such structures and so convey and use said waters, and thereby inflict upon the plaintiff and its stockholders an irreparable injury for which there is no adequate remedy at law; and that none of the defendants has made any effort or taken any step or proceeding to acquire the rights, property, and franchises of the plaintiff, nor paid or offered to pay to the plaintiff any compensation whatsoever for its rights, property, or franchises or any damages for the impairment or destruction thereof or injury thereto (Bill, Pars. 29th, 30th and 31st).

In conclusion, the bill charges:

> "Thirty-second. By reason of the premises, the obligations of the plaintiff's contracts with the State of New York herein set forth are being impaired by laws of said State and the acts and doings of the defendants under color of said laws, all in contravention and in violation of Section 10 of Aticle 1 of the Constitution of the United States; and in like

manner and by like means the plaintiff's property is being taken and the plaintiff is being deprived of its property without due process of law and without compensation, all in contravention and in violation of the Fourteenth Amendment to the Constitution of the United States; and the plaintiff invokes the jurisdiction of this Court upon those grounds for the purpose of enforcing and protecting its rights under said Constitution and the Amendments thereof."

Decision Below. Specification of Errors.

As appears from its written opinion (Rec., 36-38), the District Court examined the bill substantially as upon a demurrer for want of equity or a motion to dismiss for failure to state a cause of action, and concluded that the plaintiff did not have the rights and franchises—the contract and property—it claimed to have, that consequently the bill presented no Federal question, and that, therefore, the Court was *without jurisdiction.*

We contend that this is erroneous because:

FIRST: THE QUESTION WHETHER UPON THE FACTS ALLEGED THE PLAINTIFF HAS A CONTRACT OR PROPERTY RIGHT WITHIN THE MEANING OF THE UNITED STATES CONSTITUTION IS ITSELF A FEDERAL QUESTION, WHICH GIVES THE DISTRICT COURT JURISDICTION.

SECOND: AS A MATTER OF LAW THE BILL SHOWS ON ITS FACE THAT THE PLAINTIFF ACTUALLY HAS THE RIGHTS AND FRANCHISES—THE CONTRACT AND PROPERTY—IT CLAIMS TO HAVE, AND THAT THOSE RIGHTS AND FRANCHISES ARE BEING IMPAIRED AND TAKEN IN VIOLATION OF THE CONTRACT AND DUE PROCESS CLAUSES OF THE CONSTITUTION.

The detailed assignments of error will be found at pages 40, 41 of the printed Record.

ARGUMENT.

POINT I.

The bill having alleged the existence of a contract and its impairment and the possession of property and it deprivation without due process of law, a case arising under the United States Constitution was presented, and the District Court had jurisdiction notwithstanding the lack of diversity of citizenship.

More than three thousand dollars is involved (Bill, Par. First) and the bill is full and explicit in setting forth that the plaintiff acquired, by grant from the State, certain vested rights and franchises constituting contracts and property, and that the acts of the defendants, done under color of authority of State laws, constitute an impairment of the obligations of those contracts and a taking of that property without compensation in violation of the contract and due process clauses of the United States Constitution. The bill furthermore expressly states that the suit arises under the United States Constitution (Par. First), and that the jurisdiction of the Court is invoked for the purpose of enforcing and protecting rights under the Constittuion (Par. 32nd).

So far, therefore, as concerns any question of pleading or the purport or intent of the bill, it is obvious that the plaintiff asserts a recognized ground of federal jurisdiction.*

*Section 24 of the Judicial Code provides:

"The district courts shall have original jurisdiction as follows: First, of all suits of a civil nature, at law and in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and * * * arises under the constitution or laws of the United States * * *."

The defendants contended, however, that notwithstanding these allegations as to the existence of a contract and the possession of property rights, the facts alleged in the bill are, as a matter of law, insufficient to show that the plaintiff has a contract or property right, and that for this reason the bill does not present a Federal question; and in the opinion of the District Court delivered by Judge WARD in dismissing the suit is is said:

> "I have a right to examine the bill to see whether it shows that the complainant has any such rights as it alleges, *Underground Railroad* v. *City of New York*, 193 U. S., 416, and I think it has not."

We freely concede that a mere formal assertion of a Federal question cannot bring a Federal question into a case when the assertion is purely frivolous and without tangible basis, and that before the jurisdiction of a Federal Court can be invoked upon the ground that the suit is one arising under the Constitution or laws of the United States, it must appear from the plaintiff's own statement that the suit is one which does really and substantially involve *a dispute or controversy as to a right* which depends upon the construction of the Constitution or of some law of the United States. We concede, also, that in *Underground Railroad* v. *City of New York*, 193 U. S., 416, this Court, upon a demurrer for want of jurisdiction, examined the question of whether or not the plaintiff there really had any contract right, and upon concluding that as a matter of law no such right existed, dismissed the suit for want of jurisdiction.

But we respectfully submit that the *Underground Railroad case* is entirely contrary to other

decisions of this Court, and that when there is a real dispute or controversy as to the possession of a contract or property right the Federal Courts have jurisdiction whether the claim ultimately be held good or bad, or in other words, that Federal jurisdiction attaches when a bill makes a substantial and *bona fide* claim of a right under the Constitution, and the question whether the claim is sound in law so that the plaintiff *actually has* such right is not a question of jurisdiction but a question going to the merits of the suit. Stated in still another form, our contention is that whether or not there is a contract or a property right within the meaning of the Constitution is itself a Federal question—a question within the jurisdiction of the Federal Courts and a question which it is their pre-eminent function to determine.

The decision in the *Underground Railroad case* makes the actual and legal existence of a contract or the possession of a valid and legal property right a *sine qua non* of Federal jurisdiction and thus treats as non-Federal and excludes from the cognizance of the Federal Courts the question of whether the plaintiff has a contract or a property right within the meaning of the Federal Constitution. The logical effect of the decision is absolutely to close the doors of the Federal Courts against many suits in which, as in the case at bar, the important question in the case is whether or not certain uncontrovertible facts constitute a contract or property right within the meaning of the Constitution; for if such a question be not of such a Federal character as to give the District Court original jurisdiction, it cannot be of such Federal character as to give this Court jurisdiction by writ of error to a State Court.

It seems plain, therefore, that the *Underground Railroad case* is contrary to the principles of the numerous cases in which this Court has said that whether or not there is a contract is a question which this Court will determine for itself independent of the decisions of the State Court (*Northern Pac. R. Co.* v. *Minnesota ex rel. Duluth*, 208 U. S., 583, 590; *Russell* v. *Sebastian*, 233 U. S., 195, 202; *Louisiana Ry. & Nav. Co.* v. *New Orleans*, 235 U. S., 164, 170; *New York Electric Lines Co.* v. *Empire City Subway Co.*, 235 U. S., 179, 186, and cases cited by this Court in those cases) for the controlling principle of those cases is that such question is essentially and inherently of a Federal character. Indeed, if the doctrine of the *Underground Railroad case* were consistently followed, this Court could not entertain jurisdiction of a writ of error to a State Court in any case in which the State Court had held that no contract or property right existed, and yet this Court has repeatedly taken and exercised jurisdiction in just such cases, sometimes holding with the State Court and sometimes reversing it (*Louisiana Ry & Nav. Co.* v. *New Orleans*, 235 U. S., 164; *N. Y. El. Lines Co.* v. *Empire City Subway Co.*, 235 U. S., 179; *Atlantic Coast Line* v. *Goldsboro*, 232 U. S., 548; *Russell* v. *Sebastian*, 233 U. S., 195; *Ettor* v. *Tacoma*, 228 U. S., 148).

In addition however to these analogous cases, the *Underground Railroad case* stands impugned by several other cases originating in the lower Federal Courts and presenting situations almost identical with those presented in the *Underground Railroad case* and in the case at bar.

Thus, in *Knoxville Water Co.* v. *Knoxville*, 200 U. S., 22, the suit was by a Tennessee corpora-

tion against citizens of the same State, and the theory was that the defendants, under authority of State laws, were taking the company's property for a public use without compensation in violation of the Fourteenth Amendment. An examination of the record of the case shows that the Circuit Court overruled the the demurrer for want of jurisdiction and dismissed the bill upon the merits. A direct appeal to this Court was then taken and the decree was affirmed. At page 32, this Court said:

> "Upon the question of the jurisdiction of the Circuit Court to take cognizance of this case, without regard to the citizenship of the parties, but little need be said. The Water Company, as we have seen, insists that the agreement of 1882 constituted a contract, whereby it acquired, for a given period, an exclusive right, by means of pipes laid in the public ways and a system of water works established for that purpose, to supply water for the use of the city and its inhabitants. It also insists, as just stated, that the obligation of this contract will be impaired, if the City, proceeding under the acts of the Legislature, and under the ordinances in question, establishes and maintains an independent, separate system of waterworks in competition with those of the Water Company. *These questions having been aptly raised by the company's bill, the case is plainly one arising under the Constitution of the United States.*"

This language is at variance with the decision in the *Underground Railroad case;* and the action of the Court in affirming the dismissal of the bill *upon the merits* is also at variance with the action taken in the earlier case of *Defiance Water Co.* v. *Defiance*, 191 U. S., 184, 195, where a dismissal

of the bill upon the merits was reversed in order that it might be dismissed for want of jurisdiction.

In *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S., 65, there was no diversity of citizenship and the sole question considered by this Court was whether or not the bill presented a Federal question. The Court mentioned certain objections urged by the appellee to the validity of the alleged contract and indicated their opinion that those objections were untenable, but they then added (p. 82), "*However, we do not wish to be understood as now determining such questions in the present case, for we are only considering whether or not the Circuit Court had jurisdiction to consider them.*" The Court concluded that the cause presented a controversy so arising under the Constitution and laws of the United States as to give the Circuit Court jurisdiction and reversed the decree of dismissal and remanded the case to the Circuit Court for further proceedings. Such proceedings being thereafter had, the case came before this Court again in *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U. S., 453, and the Court there referred to its previous decision upon the question of jurisdiction and said (p. 458):

> "On the present appeal a motion to dismiss or affirm was made, which was passed, to be heard with the merits. We regard the decision of this Court, when the case was here at the former term, as settling the question of jurisdiction, and affirmatively determining that upon the bill and amended bill the complainant alleged a case which involved the application of the Constitution of the United States and appealable to this Court within Section 5 of the Act of March 3, 1891, as amended."

In *Mercantile Trust Co.* v. *City of Columbus*,

203 U. S., 311, the suit was to enjoin the construction of waterworks for supplying the defendant city and its inhabitants with water. Jurisdiction was invoked upon the ground of diverse citizenship and also upon the existence of a Federal question. The Circuit Court ruled that upon a proper alignment of the parties there was no diversity of citizenship and then dismissed the suit for want of jurisdiction, upon the ground that no Federal question was involved. In reversing that decree this Court said (p. 319):

> "Whether this case comes within the principle laid down by this Court in *City of Dawson* v. *Columbia Avenue Saving Fund, &c., Co.*, 197 U. S., 178, upon the question of diversity of citizenship, it is unnecessary to determine, because there is, in our opinion, a Federal question involved, which gave the Circuit Court jurisdiction to determine the case without reference to citizenship. It is averred in the bill that by reason of the passage of the ordinance of the common council of the City and the act of the Legislature of Georgia, passed December 3, 1902, the obligation of the contract set forth in the bill was impaired. *It is part of the duty of the Federal Courts, under the impairment of the obligation of contract clause in the Constitution, to decide* WHETHER THERE BE A VALID CONTRACT AND WHAT ITS CONSTRUCTION IS, *and whether, as construed, there is any subsequent legislation, by municipality or by the State Legislature which impairs its obligation.*"

And further, at page 322:

> "It must be remembered that in the case before us the sole question is whether the Federal Circuit Court had jurisdiction to determine the case, and *we are not now concerned with the question as to how the matter should*

be determined, but only whether the Circuit Court had jurisdiction to determine it. As stated in *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S., 65, at page 82, in speaking of the question of jurisdiction: 'We do not wish to be understood as now determining such questions in the present case, for we are only considering whether or not the Circuit Court had jurisdiction to consider them.'

"Concluding that the Court below had such jurisdiction, because it presents a controversy arising under the Constitution of the United States, the judgment of the Circuit Court is reversed, and the case remanded to that court to take proceedings therein according to law."

In *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S., 175, there was no diverse citizenship and jurisdiction depended upon the presence of a Federal question. In sustaining the jurisdiction of the Federal Courts against an attack by the defendant the Court said (p. 191):

"The Federal questions, as to the invalidity of the State statute because, as alleged, it was in violation of the Federal Constitution, gave the Circuit Court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, *even though it decided the Federal questions adversely to the party raising them*, or even if it omitted to decide them at all, but decided the case on local or State questions only."

In *The Fair* v. *Kohler Die Co.*, 228 U. S., 22, the suit was for an injunction to restrain the sale of certain patented articles. There was no diversity of citizenship and there was a plea to the jurisdiction upon the ground that the case did not arise under the laws of the United States. The Circuit Court overruled the plea and in affirming its decree this Court said:

"Obviously the plaintiff sued upon the patent law, so far as the purport and intent of the bill is concerned * * * *so that, good or bad, the cause of action alleged is a cause of action under the laws of the United States* * * *.

"Jurisdiction is authority to decide the case either way. Unsuccessful as well as successful suits may be brought upon the act, and a decision that a patent is bad, whether on the facts or the law, is as binding as one that is good. See *Fauntleroy* v. *Lum*, 210 U. S., 230, 235. No doubt if it should appear that the plaintiff was not really relying upon the patent law for his alleged rights, or if the claim of right were frivolous, the case might be dismissed * * *. *But if the plaintiff really makes a substantial* CLAIM *under an act of Congress there is jurisdiction whether the claim ultimately be held good or bad.* Thus in *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S., 65, 68, it was pointed out that, while the certificate inquired whether a Federal question was involved upon the pleadings, and while the counsel had argued the merits of the case, the function of this Court 'is restricted to the inquiry *whether, upon the allegations of the bill of complaint, assuming them to be true in point of fact, a Federal question is disclosed* so as to give the Circuit Court jurisdiction in a suit between citizens of the same State.' *For that reason the Court declined to pass upon the validity of the contract*, the obligation of which was alleged to have been impaired. *Ibid.*, 82 S. C., 202 U. S., 453, 458. *Mercantile Trust Co.* v. *Columbus*, 203 U. S., 311, 322, 323, *Knoxville Water Co.* v. *Knoxville*, 200 U. S., 22, 32."

Although these later cases do not in terms overrule or even refer to the decision in the *Underground Railroad case*, it seems clear that they

do in fact overrule that decision. In them, this Court has expressly refused to do the precise thing it did in the *Underwood case*, viz., determine the *validity* of the plaintiff's claim upon a plea to or demurrer for want of jurisdiction. In them, the Court has definitely said that it is a part of the duty of the Federal Courts to decide *whether there be a valid contract* and has definitely established the doctrine that when a contract or property right is asserted there is jurisdiction whether the claim ultimately be held good or bad. It seems to follow that the decree appealed from must necessarily be reserved, just as the similar decree of the Circuit Court in *Mercantile Trust Co.* v. *City of Columbus* was reversed (203 U. S., 311, 322).

If, however, our contention in this respect be not correct, if the jurisdiction of the District Court depends, not upon the assertion or claim of a right under the Constitution, but upon the actual possession of a legally valid contract or property right, then the jurisdictional question certified to this Court involves and depends upon the underlying, fundamental and controlling question of whether or not upon the facts alleged in the bill, assuming them to be true, the appellant has a valid contract or a valid property right, and this Court must now consider and determine that question *as a question of jurisdiction*. We therefore proceed now to a discussion of that question.

POINT II.

The bill shows on its face that the plaintiff acquired, by grant from the State, a vested right and franchise to utilize the watersheds of the Esopus, Catskill, Schoharie, and Rondout Creeks for the purpose of constructing and maintaining a water works system, and to supply water from these sources to the various municipalities of the State.

Prior to 1846 the policy of the State of New York was to create corporations and grant franchises by special acts of the Legislature. Experience produced the conviction, however, that these special legislative grants had sometimes been unwise, had sometimes been the result of favoritism toward certain interests, and had had the effect of fostering monopolies by precluding free and open opportunity to all. (See in this connection *Rochester & C. T. R. Co.* v. *Joel*, 41 N. Y. App. Div., 43 at page 48. See, also, *Russell* v. *Sebastian*, 233 U. S., 195, for an analogous situation in California.)

In consequence of this public conviction, the Constitution of that year reversed that policy and provided for the formation of corporations under general laws (Constitution of 1846, Art VIII, Sec. 1). One of the earliest and most important of these general laws is Chapter 40 of the Laws of 1848, familiarly known as "The Manufacturing Act," and another is Chapter 140 of the Laws of 1850, known as the "General Railroad Act" under which most of the railroads of the State have been organized and obtained their franchises.

The so-called "Manufacturing Act" authorized

three or more persons to form a corporation for manufacturing, mining, mechanical or chemical purposes, by filing a certificate as prescribed in the act. From time to time this act was amended and supplemented by other acts enlarging and adding to the purposes for which corporations might be formed; and in 1880 (Laws 1880, Ch. 85) the act was so amended as to authorize the formation of corporations

> "For the purpose of accumulating, storing, conducting, selling, furnishing and supplying water for mining, domestic, manufacturing, municipal and agricultural purposes."

In the following year the statute was again amended by Chapter 472 of the Laws of 1881. The acts as so amended, provided:

> "Sec. 5. Any corporation formed under this act for the purpose among other things of supplying cities with water, may acquire title to land for the purposes of their business, in the same manner specified and required in and by the act entitled 'An act to authorize the formation of railroad corporations and to regulate the same,' passed April second, eighteen hundred and fifty, and the acts amendatory thereof and supplemental thereto, and such corporation may lay pipes for the purpose of conducting water for the purposes of their business under any of the navigable waters of this State, provided they are so laid as not to interfere with the navigation of such waters * * *
>
> "Sec. 6. Such corporation so formed under this act may contract with any corporation in this State, public or private, to furnish water for any of the purposes in this act mentioned, and every corporation in this State is hereby authorized to enter into such contracts with such corporations formed under this act."

The obvious purpose of these statutes was to provide for the furnishing of cities, towns and villages with water, and it cannot be doubted that the intention of the Legislature in enacting them was to encourage the investment of private capital in such public enterprises by granting the privilege of performing this public service to whomsoever would undertake the work. It is thus at once apparent, and the authorities hereinafter cited conclusively show, that these statutes were in legal effect an open general offer by the State to all persons of the right to supply water to any municipality in the State and an invitation to all to avail themselves of this privilege.

Under these statutes the plaintiff was incorporated. It thereby accepted the State's offer, and that it was thereby granted the rights, powers and privileges specified in those statutes is too plain for argument and is expressly admitted by the defendants (Ans., Par V). These rights, as we have seen, included:

1. The right to accumulate, store, conduct, sell, furnish, and supply water for mining, domestic, manufacturing, municipal, and agricultural purposes, to cities, to other corporations, and to persons that may lawfully contract therefor.

2. The right to acquire title to land for the purpose of its business in the manner specified and required by the General Railroad Act of 1850, *i. e.*, by the exercise of the State's power of eminent domain.

3. The right to lay pipes under any of the navigable waters of the State.

4. The right to contract with any other corpora-

tion in the State, public or private, to furnish water for any of the purposes mentioned in the statutes.

Turning now to the General Railroad Act of 1850 (Laws of 1850, Ch. 140), we find it to be a general act authorizing the formation of railroad corporations by the filing of a certificate of incorporation. By the terms of that act the certificate of incorporation was required to state the *terminii* of the proposed road, *but the selection of the route was left to the corporation itself after its organization.* The companies organized under that act were expressly authorized to enter upon "the lands or waters of any person" for the purpose of making examinations and surveys necessary for the selection of the route (Sec. 28), and the statute provided that before constructing any part of its road the company should make *a map and profile of the route intended to be adopted* and file such map in the Clerk's office of the county in which the road was to be laid (Sec. 22). The statute also provided for condemnation of the necessary lands in the manner which has now become so familiar in New York, viz., by the filing of a petition by the company praying for the appointment of commissioners of appraisal to ascertain the compensation to be paid the owners and the payment of the compensation to the owners when so ascertained (Secs. 14, 18).

The effect upon the plaintiff of the repeal, in 1890, of the laws under which it was incorporated need not be specially considered here, for in 1895 the Legislature expressly declared by statute (Laws 1895, Ch. 985, quoted as Exhibit C to the Bill), that the plaintiff "may acquire in the same manner specified and required in and by" said General Railroad Act:

"such lands and waters along the watershed of the Ramapo *and along such other watersheds and their tributaries as may be suitable* for the purpose of accumulating and storing the waters thereof, and shall have the power of accumulating, storing, deducting (*sic*, conducting), selling, furnishing and supplying water for mining, domestic, manufacturing, municipal and agricultural purposes to any city, town and village and to other corporations and to persons that may lawfully contract therefor * * *"

And further that:

"Said corporation may contract with any corporation in this State, public or private, to furnish water for any of the purposes in this act mentioned, and every corporation in this State is hereby authorized to enter into such contracts with said corporation for any length of time that may be deemed advisable.

"Said corporation may lay pipes for the purpose of conducting water for the purposes of its business under any of the navigable waters of this State, provided they are laid so as not to interfere with the navigation of such waters."

By this statute there was thus confirmed to the plaintiff the rights, powers, privileges, and franchises conferred upon it by the earlier laws under which its organization had been effected. The statute further provided in Section 2 thereof for the filing of maps of the lands to be taken by the company for its corporate purposes.

These statutory provisions clearly conferred upon the plaintiff not only the right to supply water to any town, city or village in the State, but, also, *the right to make its own selection of the sources from which it would obtain water, and*

the right to acquire ownership of those sources IN INVITUM *when selected.* The statutes thus constituted not merely a facility or capacity for corporate organization, nor yet a mere general offer or invitation to undertake the performance of a public service, but, also, *a floating or distributive grant of the right to utilize for the purpose of supplying municipalities with water whatever sources of supply the plaintiff might select.* Reverting then to the allegations of the bill, we find that the plaintiff, in reliance and upon the faith of these statutes, selected as sources of supply the watersheds of the Esopus, Catskill, Schoharie and Rondout creeks and manifested and declared that selection, both by filing its maps of these lands and waters which it proposed to utilize and by offering to supply the defendant City with water from those sources.

When this selection was made, the State's open general offer of the privilege of supplying water to any city from any source was accepted, and the floating or distributive grant of the right to use *any* source of water supply then became fixed and specific, and there was thus then vested in the plaintiff a specific right to utilize the particular sources it had selected, just as effectively as if the grant had been contained in a special act specifically designating these particular sources by name, and directly vesting in the plaintiff by name the right to utilize those named sources for its own corporate purposes. In other words, as expressly alleged in the bill:

> "By its incorporation and organization aforesaid and by making and filing the maps hereinbefore referred to, the plaintiff acquired and became possessed of a vested right and

franchise to construct and maintain, upon the lands and waters covered by and designated on said maps, reservoirs, dams, aqueducts, and other appurtenances of a system of water supply; to accumulate, store, conduct, sell, furnish, and supply, for the purposes and to the persons and corporations specified in its certificate of incorporation, the waters contained in and to be derived from the watersheds, lands, streams, lakes and ponds covered by and designated on said maps; and to otherwise use the lands, streams, lakes, and ponds so covered by and designated on said maps for the accomplishment of the plaintiff's corporate objects and purposes and the prosecution of its business; which said right and franchise of the plaintiff was and is exclusive as to all other persons and corporations and legally and equitably free from the interference of any person or corporation; and from and after the time of the filing of said maps, the lands, streams, lakes, and ponds covered by and designated on said maps were and ever since have been and now are legally and equitably subject to the plaintiff's said franchise."

This view as to the effect of these statutes and of the plaintiff's acts thereunder is sustained, and, in fact, compelled, by a large number of controlling authorities to which we now beg to direct the attention of the Court.

The legal principle here involved, to wit, the conception of a general legislative provision authorizing the performance of a public service by the exercise of some statutory privilege or the utilization of the property of another, as a general offer and distributive grant, which, by acceptance by some individual, becomes a *contract*, is stated, illustrated and applied in the very recent decision

of this Court in *Russell* v. *Sebastian*, 233 U. S., 195, decided at the last term.

That case involved the rights of the Economic Gas Co., under a provision of the Constitution of California of 1879, which provided that in any city where there were no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual or any company duly incorporated under the laws of the State for such purpose, should, under the direction and general regulations of the municipal authorities, have the privilege of using the public streets and thoroughfares thereof and of laying down pipes and conduits therein and connections therewith so far as might be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and other purposes, upon the condition that the municipal government should have the right to regulate the charges thereof. It appeared that the Gas Company had been organized in 1909 to manufacture and distribute gas within the City of Los Angeles for lighting purposes. It acquired an existing gas plant and made certain extensions to that system. In 1911 the State Constitution was amended, and under the authority of such amendment the City of Los Angeles made an ordinance providing that no one should exercise any franchise or privilege to lay or maintain pipes or conduits in the streets for conveying gas or water without having obtained *a grant from the city.* It was contended that the ordinance and the constitutional amendment upon which it rested, so far as they interfered with the extension by the company of its lighting system, impaired the obligation of the company's contract

with the State, and also deprived it of its property without due process of law in violation of the United States Constitution; and that contention was sustained by this Court.

In referring to the constitutional provision of 1879, Mr. Justice HUGHES, delivering the unanimous opinion of this Court, said (p. 203):

> "It is pointed out that the language of the provision was *general both with respect to persons and to places;* that it embraced all the cities in the State; and that it *did not provide for any formal or written acceptance of the offer.* But the lack of a formal character did not preclude acceptance in fact. *Nor did the generality of the provision with respect to all persons and cities make it impossible for particular persons to acquire rights thereunder in particular cities.* It is clear that the offer was to be taken distributively with respect to municipalities. It referred to 'any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light;' *and when as to such a city the offer was accepted, the grant became as effective as if it had been made specially to the accepting individual or corporation.*"
>
> (P. 204): "That the grant, resulting from an acceptance of the State's offer, constituted a contract, and vested in the accepting individual or corporation a property right, protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this Court."

The learned Justice then stated that the controversy in the case before him related to the extent to which the grant had become effective through acceptance; that it was not contended

that the change in the Constitution could disturb the company's rights in the streets used previous to the amendment; but that it was insisted that such *actual user* measured the range of the acceptance of the grant and hence defined the limits of its operation. In rejecting this view and the further contention that the only way the offer contained in the constitutional provision above mentioned could be accepted was by an actual use of the streets, this Court stated, among other things, as follows (p. 207):

> "In deciding upon the policy of making these direct grants it was for the State to determine their terms and their scope; it could have imposed whatever conditions it saw fit to impose. But it did not attempt to confine the privilege to particular streets or areas, or to make the laying of the necessary pipes conditional upon the renewal of the offer, street by street, or foot by foot, as the pipes were put in the ground. * * * *The individual or corporation undertaking to supply the city with water or light was put in the same position as though such individual or corporation had received a special grant of the described street rights in the city which was to be served. Such a grant would not be one of several distinct and separate franchises. When accepted and acted upon it would become binding—not foot by foot, as pipes were laid—but as an entirety, in accordance with its purpose and express language.*"

(P. 208):

> "In view of the nature of the undertaking in contemplation, and of the terms of the offer we find no ground for the conclusion that each act of laying pipe was to constitute an acceptance *pro tanto*. We think that the offer was intended to be accepted in its entirety as made,

and that *acceptance lay in conduct committing the person accepting to the described service.* The offer was made to the individual or corporation undertaking to serve the municipality, and when that service was entered upon and the individual or corporation had *changed its position beyond recall,* we cannot doubt that the offer was accepted. *City Railway Co.* v. *Citizens R. R. Co.*, 166 U. S., 557, 568; *Grand Trunk Rwy. Co.* v. *South Bend, supra.* In this view, the grant embraced the right to lay the extensions that were needed in furnishing the supply within the city."

The Court also referred, with approval, to *People ex rel. Woodhaven Gas Co.* v. *Deehan*, 153 N. Y., 528, as holding that a grant of authority to lay pipes and conduits for conveying gas through the streets of a town so as to render service to the people of the town, *extended as a property right not only to the streets then existing but also to those subsequently opened.* The Court then concluded as follows:

> *"The company, by its investment, had irrevocably committed itself to the undertaking and its acceptance of the offer of the right to lay its pipes, so far as necessary to serve the municipality, was complete.*
>
> "We conclude that the constitutional amendment of 1911, and the municipal ordinances adopted in pursuance thereof, were ineffectual to impair their right, and that the company was entitled to extend its mains for the purpose of distributing its supply to the inhabitants of the city subject to the conditions set forth in the constitutional provision as it stood before the amendment."

This late decision of this Court is thus clear, explicit and decisive, in holding that a general legislative authority to exercise a special right or

privilege, such as the right to supply cities with water, is an offer by the State which is converted by an acceptance by some particular corporation into a binding contract and a vested property right; and that such an offer is accepted when some individual or corporation, by an investment of money and a change of position upon the faith of the offer, undertakes to perform the described service.

Other recent cases establishing the doctrine that such legislative grants constitute contracts and property rights within the meaning and protection of the Federal Constitution, and that such contracts and property rights become vested and binding from the time of acceptance even though the accepting corporation have not yet actually entered upon the performance of the service or made actual user of the rights offered, are:

Louisville v. *Cumberland Telephone Co.*, 224 U. S., 649.

Boise Water Co. v. *Boise City*, 230 U. S., 85.

Grand Trunk Western Ry. v. *City of* South Bend, 227 U. S., 544.

N. Y. Electric Lines Co. v. *Empire City Subway Co.*, 235 U. S., 179.

To the same effect is:

Suburban Rapid Transit Co. v. *Mayor, etc.*, 128 N. Y., 510.

There is, also, in this Court another line of cases which, by analogy, are of exact application here, and which fully establish the doctrine that the statutes here involved constitute what is appropriately termed a "floating grant" of the right

to utilize whatever sources of supply the plaintiff might select, which grant became vested and attached to particular sources when the plaintiff selected the particular sources it proposed to utilize, although actual title and ownership of the land involved had not been acquired. The cases referred to are those which arose under the Acts of Congress granting lands to aid in the construction of railroads in the northwest.

One of these cases is *St. Paul & Pacific R. R. Co.* v. *Northern Pac. R. R. Co.*, 139 U. S., 1. The statute there under consideration contained a general grant of land "on each side of said railroad line as said company may adopt," but provided that the patent for the land should not issue until twenty-five miles of the road had been completed and ready for service, and that as additional sections of twenty-five consecutive miles were completed the patent should be issued for the lands adjoining the road so completed. It was contended that these provisions prevented the grantee from obtaining title until the road was actually completed, but this Court said (p. 5):

> "As seen by the terms of the third section of the act, the grant is one *in præsenti;* that is, it purports to pass a present title to the lands designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, preemption or other disposition previous to the time the definite route of the road is fixed. * * *
>
> *"The route not being at the time determined the grant was in the nature of a float,* and the title did not attach to any specific sections until they were made capable of identification; *but when once identified the title attached to them as of the date of the grant,* except as to such sections as were specifically reserved. It

is in this sense that the grant is termed one *in præsenti*, that is to say, it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route.

"This is the construction given to similar grants by this Court, where the question has been often considered; indeed, it is so well settled as to be no longer open to discussion."

In *Van Wyck* v. *Knevals*, 106 U. S., 360, the question was as to when the grant made to Kansas by an Act of Congress for the use and benefit of a railroad took effect so as to cut off the right of pre-emption from subsequent settlers on the land. Upon this point the Court said:

"The grant is of ten alternate sections, designated by odd numbers, on each side of the proposed road, subject to the condition that if it appear, when the route of the road is 'definitely fixed,' that the United States have sold any sections or a part thereof, or the right of pre-emption or homestead settlement has attached, or the same has been reserved by the United States for any purpose, the Secretary of the Interior shall cause an equal quantity of other lands to be selected from odd sections nearest those designated in lieu of the lands appropriated, which shall be held by the State for the same purpose. The grant is one *in præsenti*, except as its operation is affected by that condition; that is, it imports the transfer, subject to the limitations mentioned, of a present interest in the lands designated. The difficulty in immediately giving full operation to it arises from the fact that the sections designated as granted are incapable of identification until the route of the road is 'definitely fixed.' *When that route is thus established the grant takes effect upon the sections by relation as of the date of the act of*

Congress. In that sense we say that the grant is one *in praesenti. It cuts off all claims, other than those mentioned, to any portion of the lands from the date of the act, and passes the title as fully as though the sections had then been capable of identification.* Nor is this operation of the grant effected by the fact that patents of the United States are subsequently, upon the certificate of the Governor, to be issued by the Secretary of the Interior directly to the company and not to the State. This is only a mode of divesting the State of her trust character and of passing the legal title held by her to the party for whose benefit the grant was made. * * * It matters not, so far as subsequent settlers are concerned, in what manner the title, which has passed out of the United States, is transferred to the company from the State. *When the route of the road is 'definitely fixed,' no parties can subsequently acquire a pre-emption right to any portion of the lands covered by the grant. The right of the State and of the company is thenceforth perfect as against subsequent claimants under the United States."*

Paraphrasing some of the foregoing language, when the plaintiff here "definitely fixed" the sources of water supply it would adopt, the State's general grant of the right to acquire lands and waters for its corporate purposes took effect; the right of the plaintiff to those sources was thenceforth perfect as against subsequent claimants under the State and no other parties could subsequently acquire any right to the sources, nor was this operation of the grant affected by the fact that the plaintiff had not completed condemnation proceedings, for such proceedings are only a mode of divesting the individual owners of their title to and right of possession of the lands and

have nothing to do with the exclusion from the land of other claimants seeking to utilize the land as sources of water supply.

In the subsequent case of *Kansas Pac. R. Co.* v. *Dunmyer*, 113 U. S., 629, the grant was of all the land in a certain described territory "to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed," and the question was as to when the line of the road was "definitely fixed" within the meaning of the statute. The Court held (p. 634):

> "* * * Under this grant, as under many other grants containing the same words, or words to the same purport, *the act which fixes the time of definite location is the act of filing the map or plat of this line in the office of the Commissioner of the General Land Office.*
>
> "The necessity of having certainty in the act fixing this time is obvious. Up to that time the right of the company to no definite section, or parts of section, is fixed. Until then many rights to the land along which the road finally runs may attach, which will be paramount to that of the company building the road. *After this no such rights can attach, because the right of the company becomes by that act vested.* It is important, therefore, that this act fixing these rights shall be one which is open to inspection. At the same time it is an act to be done by the company. The company makes its own preliminary and final surveys by its own officers. *It selects for itself the precise line on which the road is to be built*, and it is by law bound to report its action by filing its map with the Commissioner, or rather, in his office. The line is then fixed."

In *Walden* v. *Knevals*, 114 U. S., 373, the Court affirmed the doctrine announced in *Van Wyck* v. *Knevals, supra*, and said (p. 376):

"It thus appears that the defendant made his entry, and therefore acquired whatever rights he possesses after the map of the company designating its route had been filed with the Secretary of the Interior, March 25, 1870, and the route had thereby become definitely established. *The title of the company to the adjoining odd sections was then fixed. No rights could be init'ated subsequently which could affect that title.* The entry of the defendant being on the 8th of April afterwards created no interest in him, and the patent issued upon that entry passed none."

Thus, under these analogous statutes this Court has decided that upon the filing of the map evidencing the selection of the route the right of the company to the lands selected by it becomes *vested*, and the lands covered by the map are then no longer subject to subsequent claimants; and the doctrine of those cases is controlling here. The statutes involved in those cases were general legislative grants to unnamed beneficiaries of the *absolute ownership* of unidentified lands under such terms that specific lands could become subject to the grant only by the selection of a railroad route. Here, the statutes are of the same nature, *i. e.*, are general legislative grants to unnamed beneficiaries of the *right to acquire and use for water supply purposes* unidentified lands and waters under such terms that specific lands and waters could become subject to the grant, only by the selection of sources of water supply. In both instances the selection was left to the discretion of the beneficiary of the grant. In those cases it was held that the definite selection of the railroad route by filing a map thereof constituted an identification of the lands embraced in the grant so as to vest the same in the corporation filing the map and

cut off other claimants. In like manner it must be held here that the selection of the particular sources covered by and designated on the maps filed by the plaintiff constituted an identification of the lands and waters embraced in the grant so as to vest the right to utilize them for water supply purposes in the plaintiff and cut off the right of all other persons and corporations to acquire or use those lands and waters for the same purpose.

In the State Courts, too, it has been uniformly held that where railroad and other corporations acting pursuant to statutory authority, locate their routes or otherwise select the particular lands which they propose to utilize in the performance of their public functions, they obtain a vested right and franchise to utilize such lands, and that such lands are then subject to this franchise although not yet actually acquired from the owners by purchase or condemnation.

One of the leading cases upon this question is *Williamsport & North Branch R. Co.* v. *Philadelphia & Erie R. Co.*, 141 Pa., 407, 12 L. R. A., 220, which was an action by one corporation to enjoin another from locating its railroad upon land alleged to have been previously appropriated by the plaintiff. The Court there held that a railroad is located so as to exclude the appropriation of the land selected by other persons when a definite location has been adopted by the action of the company, and that such location gives an exclusive right to the land as against all third persons and rival corporations even in advance of its actual acquisition from the owner.

Another State court decision worthy of special consideration here, both on account of its well-considered opinion, the similarity of the questions

involved, the number of authorities it cites, and the fact that it involved territory not yet in actual use by the company claiming prior rights, is the case of *Nicomen Boom Co.* v. *North Shore Boom Co.*, 40 Wash., 315; 82 Pac., 412. That was a suit in equity by one boom company to enjoin another from constructing a boom within the limits of the territory included in the plat and survey filed by the plaintiff as showing the shore lines, lands, and waters it proposed to appropriate for its corporate purposes. The Court treated the situation as analogous to the situation presented by the filing of plats by railroad companies and said (p. 325):

> "Under legislative schemes for the location of railroad lines which are initiated by the filing of plats of location, it is held that compliance with the law in that particular secures to the locating company the right to construct and operate a railroad upon such line, exclusive in that respect, as to all other railroad corporations, and free from the interference of any party. *The right to locate its line of road in the place of its selection is delegated to the corporation by the sovereign power.* The further right to subsequently acquire, *in invitum*, the right of way and necessary lands for operation of the road from the land owners is likewise delegated. *The source of the franchise is in the sovereign power, which power confers the franchise upon the corporation as its delegated representative*, and the grant is for the public, and not for private, purposes. * * * It is further held that, when a franchise has been thus conferred, no other railroad company may acquire title to the lands within such a location, or construct a road thereon, to the exclusion of the right of the first locating company to acquire such title *in invitum*, and to construct its road upon the

lands. Injunction has also been adopted as the proper remedy to prevent such interference. In support of the above propositions, which we have stated generally, we cite the following authorities: *Rochester, etc., R. Co. v. New York, etc., R. Co.*, 110 N. Y., 128, 17 N. E., 680; *Barre R. Co. v. Granite R. Co.*, 61 Vt., 1, 17 Atl., 923; 15 Am. St., 877; 4 L. R. A., 785; *Sioux City, etc., R. Co. v. Chicago, etc., R. Co.*, 27 Fed., 770; *Morris, etc., R. Co. v. Blair*, 9 N. J. Eq., 635; *Titusville, etc., R. Co. v. Warren, etc., R. Co.*, 12 Phila., 642; *Williamsport, etc., R. Co. v. Philadelphia, etc., R. Co.*, 141 Pa. St., 407, 21 Atl., 645, 12 L. R. A., 220; *Railway Co. v Alling*, 99 U. S., 463."

After answering certain contentions of the respondent, the Court proceeded:

> "Applying the rule followed in the railroad case, appellant had the right, after filing its plat of location, to acquire the title to the lands within the limits of its location. It was an absolute right which it could enforce by condemnation proceedings to the exclusion of any other boom company that might seek to appropriate the same land."

See, also, *Contra Costa Railroad Co. v. Moss*, 23 Cal., 323.

All these cases necessarily rest upon and involve the proposition that any statutory authority to construct and operate a railroad, water-supply system, or other public utility, and to acquire the lands and waters appropriate to be used in connection therewith, constitutes *the grant of a franchise or property right*; that when the corporation possessing this authority selects a particular piece of land or body of water for the purpose of utilizing it in connection with its performance of the public service, such land or body of water becomes subject to

the franchise; and that there is then vested in the corporation, by grant from the State, an indefeasible right to utilize such land or water for its corporate purposes, which right, whether designated a franchise or not, is a contract right and a right of property. This is precisely the proposition for which we here contend and the cases cited are controlling.

The proposition, moreover, has been directly applied by the New York Court of Appeals to the very statute here involved, the decision being rendered just prior to the time the plaintiff commenced its undertaking.

In *Rochester, Hornellsville & Lackawanna R. R. Co.* v. *New York, Lake Erie & Western R. R. Co*, 44 Hun, 206, 110 N. Y., 128, the question was presented as to the effect of the filing of a map under the General Railroad Act of 1850, to which we have referred above. In that case the plaintiff company sought to enjoin the defendant from interfering with a strip of land covered by the map of the plaintiff's proposed route, which had been filed in accordance with the statute. The injunction was refused by the Trial Court, but this order was reversed by the General Term of the New York Supreme Court in March, 1887, and the decision of the General Term was affirmed by the Court of Appeals in June, 1888. In rendering its decision the General Term said (44 Hun, p. 206):

> "Under the general railroad act, *when a corporation has been organized in compliance with the conditions of the statute and has made a map and profile of the route intended to be adopted by the company,* duly certified and filed as required by the twenty-second section *it has acquired a vested and exclusive right to build, construct and operate a rail-*

road on the line which it has adopted, subject to the right of other railroad companies to cross its route and lands in the way and manner and for the purposes provided by law. * * * The plaintiff has a franchise conferred upon it by the Legislature to construct its road over the established line."

In affirming this decision, the Court of Appeals (then composed of Judges RUGER, ANDREWS, EARL, DANFORTH, FINCH, PECKHAM and GRAY), in a unanimous opinion, said (110 N. Y., 132-134):

"In their opinion the General Term considered that a case had been made for the allowance of a preliminary injunction and that the same should be continued *pendente lite*, on the ground that the plaintiff had acquired *a vested and exclusive right to construct and operate its railroad on the line it had located.* We think the General Term were right in the view they took of the matter.

"*The plaintiff, by its organization, under the general railroad act of 1850, became possessed of the franchise to construct and operate a railroad between the terminal points named in its articles, over such a line of route as it should elect.* When the initial steps, pointed out in the twenty-second section of the act had been taken, there only remained for the plaintiff to acquire through purchase, or through proceedings *in invitum*, the right of way over the lands through which the line of route had been surveyed. By the terms of that section every company formed under the act, before constructing any part of its road through any county, must make and file a map and profile of the route intended to be adopted and must give a written notice to all occupants of the land affected, of the time and place of filing, and that the route designated passes over the land of such occupants.

"Clearly there is involved in these provisions the intention of the Legislature that, after the initial proceedings have been taken, which the statute points out as the first action of the new corporation, the lands over which the company's route is located shall be subjected to the right of the company thereafter to construct thereon. The legislative scheme contemplates the determination of the line of route to be *in the discretion of the company*, to be exercised in the mode prescribed by law and its exercise, when in good faith and within the limits of its corporate powers, is only reviewable by the Court in the case of an application by an occupant or owner of lands feeling aggrieved by the proposed location of the road. *This right to locate its line of road, at its election, is delegated to the corporation by the sovereign power;* as is the right subsequently to acquire, *in invitum*, the right of way from the landowner and any land needed for the operation of its road. *In this sovereign power is the source of the franchise*, which the corporation possesses to construct and operate a railroad, and its grant is for public and not for private purposes. Public considerations enter into the grant of the franchise and public policy favors the enterprise for the public convenience and use. When, therefore, a corporation has made and filed a map and survey of the line of route it intends to adopt for the construction of its road, and has given the required notice to all persons affected by such construction, and no change of route is made, as the result of any proceeding instituted by any landowner or occupant, in our judgment, it has acquired the right to construct and operate a railroad upon such line; exclusive in that respect as to all other railroad corporations and free from the interference of any party. By its proceedings it has impressed upon the lands a lien in favor

of its right to construct, which ripens into title through purchase or condemnation proceedings. We could not hold otherwise without introducing confusion in the execution of such corporate projects and without violating the obvious intention of the Legislature.

"The plaintiff's franchises were invaded and its enjoyment of the statutory privileges disturbed by the action of the defendant company, in so building tracks upon plaintiff's line of route as to obstruct and interfere with its proposed construction. The remedy by injunction was clearly available to the plaintiff on principles of equity jurisprudence (Story's Eq. Jur., Sec. 927; *Osborn* v. *U. S. Bank*, 9 Wheat., 740; *Croton Turnpike Co.* v. *Ryder*, 1 Johns. Ch., 611; *T. & P. R. R. Co.* v. *W. & V. R. R. Co.*, 12 Phila., 642; *Contra Costa R. R. Co.* v. *Moss*, 23 Cal., 323; *Boston, etc., R. R. Co.* v. *Salem, etc., R. R. Co.*, 22 Cush., 27).

"The able opinion at General Term, delivered by Barker, J, renders further consideration of the points in this case unnecessary."

The same principle was reiterated in *Suburban Rapid Transit Co.* v. *Mayor, etc.*, 128 N. Y., 510, decided by the New York Court of Appeals in 1891. The plaintiff in that case had been organized in 1880 under the Rapid Transit Act of 1875. Under the provisions of that act the route of the road was determined, not by the corporation, but by certain Commissioners appointed by the public authorities, and this location of the route, as well as the obtaining of the consents of the property owners that were required by the act, preceded the organization of the corporation. In 1884 the Legislature passed the New Parks Act, laying out certain parks in the City of New York, one of which, designated as "St. Mary's Park," included within its limits a strip of private land over which the plaintiff pro-

posed to run its road. The plaintiff *subsequently* acquired this strip of land by condemnation proceedings. Thereafter, the City condemned the land for the park in accordance with the Act of 1884, and an award was made in favor of the plaintiff, but the plaintiff refused to accept it. It then brought an action to enjoin the defendants from preventing the plaintiff constructing its road over the land in question. *It will be observed that at time of the passage of the Act of 1884 the plaintiff in that case had neither built its road nor acquired ownership of the land over which the road was to be built.* All that it had accomplished was the effecting of its corporate existence and the location of the route of the road. It was, therefore, in precisely the same situation as is the plaintiff in the case at bar. The determination of the Court of Appeals as to the nature and extent of the rights of the plaintiff there are consequently exactly applicable to the plaintiff here. The Court of Appeals was then composed of Judges RUGER, ANDREWS, EARL, FINCH, PECKHAM, GRAY and O'BRIEN, and in delivering the unanimous opinion of these eminent jurists, Judge GRAY said (p. 515):

> "The question, which is presented to us, relates to the effect of the passage of the New Parks Act of 1884, upon any then existing franchises and rights of the plaintiff corporation If by its organization, under the Rapid Transit Act of 1875, it had become *possessed of the franchise to construct, operate and maintain its railroad over the routes designated and located* by the Mayor's Commissioners, which operated to vest in it a legal right to have the lands affected by the designation, then I think we must hold that the Act of

1884 was inoperative to take away, or to authorize the deprivation, or curtailment of such a right.

"The text of the opinions rendered in the Supreme Court is that the plaintiff, at the time of the passage of the New Parks Act in 1884, had acquired *no actual ownership* in the land in question and *had not commenced the proceedings to acquire such ownership.* Therefore, it was considered that by the Act of 1884 there was an exclusive devotion of the land to strictly park purposes, which was a use inconsistent with a railroad use, and that any inchoate right, previously acquired by the plaintiff, to proceed to the acquisition of the land for the construction of its railway was defeated.

"The learned Justices seem to have fallen into two errors. They have given to the language of the New Parks Act a construction, by which the particular tract of land, designated for St. Mary's park, is appropriated to such a purpose to the exclusion of the plaintiff's railway, and they have *failed to recognize the acquisition and possession by the plaintiff of an indestructible franchise, in the exercise of which the condemnation of the land was but an incidental feature* and in furtherance of a scheme which the organization of the corporation had given vitality to and to which, in the view I take, the land had become subjected by the paramount exercise of sovereign power. The learned Justice at Special Term admitted that, at the time of the passage of the New Parks Act of 1884, the lands through St. Mary's park 'had been lawfully designated under a general act as part of the general route of the plaintiff's railroad;' but because not 'devoted to a railroad use actually in exercise,' he thought that 'there was no actual prior use to be considered by the Legislature.'"

After then referring to the statutory provisions under which the plaintiff was incorporated, Judge GRAY continued (p. 519):

> "It seems to me that when the proceedings instituted under the Rapid Transit Act of 1875, have terminated in the *organization of a corporation, which must construct, maintain and operate a railroad upon certain routes prescribed and located by commissioners,* as the public agents directed by the act to be appointed for that purpose, *the lands necessary for the purpose have been as much appropriated and devoted to that exclusive use by sovereign power, as though it had been so declared in some special enactment.* When the route or routes were located, upon which the railroad of the new corporation should be constructed, what other legal effect could follow except a subjection of the land affected to this species of public use, as through the exercise of paramount right?
>
> "The subsequent purchase, or condemnation of the title to the lands, in the course of the railroad construction, was merely incidental, and was necessary in order to compensate property owners for the land taken, and to effect a transfer of the legal title. *The right which the plaintiff acquired to construct and operate the railroad upon the route described in its articles of association lacked nothing for its efficacy or completeness.* It had become an obligation, and was one of the unalterable conditions and a fixed public feature of the corporate existence. When to it were subsequently added the consents of municipal authorities and of property owners, was any feature wanting to the fullest franchise in such respects? To say that the right to appropriate the land on the designated routes for railroad uses was not vested, but merely inchoate, in my judgment would be a

great misapprehension of the effect and value of formal proceedings conducted under legislative authority and direction, and of the formal consents of the public authorities to the projected line. * * * *How can a franchise so conferred by the Legislature be deemed inchoate and defeasible?* Is not the possession an element of the security upon which capital has been subscribed and loans have been made to the company? The construction of this railroad had been proceeded with upon the plans of the commissioners and with reference to the projection of the route upon the line designated and consented to. The company's funds had been expended with reference to its road being constructed upon the plans and routes designated by the public agents. In the case of the Broadway Surface Railroad (*People* v. *O'Brien*, 111 N. Y., 1), the corporate franchise, acquired under the authority of the Legislature and the consents of the municipal authorities, to lay tracks and to run cars upon Broadway, was held by us to be a right indestructible by the Legislature, and to constitute property in the highest sense of that term.

"I think we must conclude that the statutory proceedings, which resulted in the organization of the plaintiff corporation, had the effect of vesting in it the absolute and exclusive franchise to build upon the route located for it, and to the use of which the lands were devoted, through the exercise of the paramount right of sovereign power; which franchise was unimpaired, with respect to the right to take and use the land in question, by the fact that the work of actual construction had not reached it, at the time the Legislature passed the act for the new parks."

The highest Court of New York has thus emphatically declared that when a railroad route has been selected the land covered thereby has been as

much appropriated to the exclusive use of the company as though it had been so declared in some special enactment; that the company then has a right and franchise to use those lands for its corporate purposes; and that though condemnation proceedings have not been started nor any title to the land acquired by purchase nor any railroad actually constructed, such right and franchise is not inchoate or defeasible but *vested* and indestructible and in every sense a right of property. The decision is of exact application here and is one of the decisions upon which the plaintiff relied in its undertaking. It exactly sustains our contentions, and there should be no hesitation upon the part of this Court in following and applying it to the case at bar.

The foregoing authorities, including repeated and well-considered decisions of the highest Courts of State and Nation, thus leave no room for doubt that the acts done by the plaintiff under the authority and upon the faith of the statutes to which we have referred, vested in the plaintiff a right and franchise to utilize the watersheds of the Esopus, Catskill, Schoharie and Rondout Creeks for the purpose of constructing and maintaining a waterworks system for supplying water to the various municipalities of the State, and the further right and franchise to conduct its waters along the aqueduct routes it had located and under the navigable waters of the State, and to sell those waters to any municipality, or corporation in the State.

We desire now to make specific answer to

THE CONTENTIONS URGED BY THE APPELLEES BELOW AND THE VIEWS EXPRESSED IN THE OPINION OF THE DISTRICT COURT.

In the Court below it was contended on behalf of the appellees: (1) The statutory provisions authorizing the plaintiff to acquire land "in the same manner specified and required in and by" the General Railroad Act simply gave the plaintiff the right of eminent domain and did not incorporate into those statutes the provisions of the General Railroad Act which relate to the filing of maps, so that even if the Courts of New York had decided that the effect of filing maps under the General Railroad Act was to give a vested right and franchise to use the lands designated on these maps, it would not follow that such was the effect of the filing of the plaintiff's maps; and (2) Even under the General Railroad Act no route is located and no rights accrue unless and until *notice of the filing of maps* is given to the occupants of the land.

Both of these contentions were sustained by the District Court, and it is indeed solely upon this ground that the plaintiff was defeated below.

Although the filing of a map under the General Railroad Act is not the commencement of a "condemnation proceeding" as that term is used in New York (indicating the institution of a proceeding in Court), it is obvious from a reading of the act that such filing is one of the steps necessary to be taken in the course of acquiring title by exercise of the right of eminent domain; and as it is conceded that the effect of those provisions was to give to the plaintiff and other water companies the right to acquire title by the right of eminent domain "in the same manner specified and required in and by the General Railroad Act," it is exceedingly difficult to see how it can be said that the provisions of that act with reference to filing maps have not been incorporated into the statutes under which the plaintiff was organized.

We deem it unnecessary, however, to argue the point here. The maps upon which the plaintiff relies as selections of the watersheds of the Esopus, Schoharie, Catskill, and Rondout Creeks as its sources of supply were filed under and pursuant to the Act of 1895 (see Bill, Pars. 13th and 14th); and that act, in addition to providing in Section 1 that the plaintiff might acquire land in the manner specified in the General Railroad Act, contained, also, in Section 2 direct and express provision for and expressly authorized the filing of the maps under which the plaintiff claims. The effect of such filing may, therefore, be considered with sole reference to Section 2 of the Act of 1895, entirely independent of the provisions contained in the General Railroad Act.

Section 2 of the Act of 1895, which, it will be remembered is a special act defining the powers of the plaintiff, provides:

> "Said corporation, before constructing any parts of its works in any County in which it does business, or instituting any proceedings for the condemnation of real property therein, shall make a map of the route adopted and land to be taken by it in such County. * * *"

In view of this express provision for the filing of maps, the question whether the more general provision authorizing the plaintiff to acquire land in the manner specified in the General Railroad Act makes applicable to the plaintiff the provisions of that act relative to filing maps, is of exceedingly little importance here, though of course, we do not waive our contention that it does. And if such filing under the General Railroad Act gives a right to use the lands designated on the maps, the same result must follow here. We, therefore, pass at

once to the second branch of the appellees' argument stated above, viz., the necessity for the service of notices.

The service of notice of filing upon the occupants of the lands designated on the maps is said to be a prerequisite to the "location of a route" under the General Railroad Act (and hence, by analogy under the Act of 1895), because upon service of the notice some occupant may obtain a change in the route proposed by the company, and hence the right of the company to acquire and use the land designated on the map does not really attach nor the route become fixed until after the notices are served, and the time within which a change can be made has elapsed. It was also pointed out below that in the case of *Rochester, etc., Co.* v. *New York, etc., Co.*, 110 N. Y., 128, which was cited by the plaintiff, the notice of filing had been served and a change of route had been denied.

In answer to this we point out, first, that, although in the case cited the notices had in fact been served, the decision upholding the right of the company which first filed its maps is not in the slightest degree predicated upon that fact, nor is there anything in the opinion to indicate that the Court regarded that fact as controlling. On the contrary, in the opinion of the General Term, which was approved by the Court of Appeals, it was expressly said:

> "Under the general railroad act when a corporation has been organized in compliance with the conditions of the statute and has made a map and profile of the route intended to be adopted by the company, duly certified and filed as required by the twenty-second section it has acquired a vested and ex-

clusive right to build, construct and operate a railroad on the line which it has adopted."

We direct attention to the fact, also, that while we have referred at some length to the case of *Rochester, etc., Co. v. New York, etc., Co., supra*, as well as to other decisions of the New York and other State Courts, because in our opinion these cases announce principles which are applicable here, and while the plaintiff relied and acted upon the interpretation of the law announced by the New York Court of Appeals in that case, we are now dealing directly with the question whether the plaintiff acquired such a right to the lands covered by its maps as makes the defendants' utilization of the same lands for the same purpose a taking of its property or an impairment of its contract within the meaning of the Federal Constitution. That question, as already pointed out, is one which this Court determines for itself independently of the decisions of the State Courts, and as applied to this case the question is different from and independent of the question whether under the State Court's construction of the statute the filing of a map without the service of notice constitutes "the location of a route." We do not claim for a moment that the filing of these maps created any right as against the owners of the land or in any way burdened or encumbered their title beyond the burden resting equally upon all property everywhere of being subject to a lawful exercise of the power of eminent domain. What we do contend, as already stated, is that the general statutory authority to supply cities with water and to acquire *in invitum* the lands and waters necessary and suitable for this purpose constituted an offer and floating or distribu-

tive grant by the State which was accepted by the plaintiff's undertaking to perform this service and its selection of these particular sources with the incident change of position and expenditure of money upon the faith of the offer, and that by this acceptance the offer became a contract and the floating or distributive grant of *any sources of supply* became specific and fixed upon the particular sources selected by the plaintiff, to the extent, at least, of preventing the taking of these sources by another person for the same or a similar purpose without due process of law, *i. e.*, without just compensation. This contention does not depend upon whether the filing of a map without the service of notice constitutes the technical "location of a route," for conceding, for the argument, that until the notices are served no route can be so definitely located as to preclude an owner from effecting a change, it by no means follows that until that is done any rival or competing company or a municipal corporation can appropriate the same lands for the same purpose and thus exclude the company which was first in the field. If, therefore, this Court entertain the view (to which, we think, the principles of its own prior decisions fully commit it) that the plaintiff's acts constituted an acceptance of the State's offer so as to make a binding contract, then the defendants, who are not themselves owners or occupants of the land but mere third persons seeking to appropriate it for uses similar to those proposed by the plaintiff, are prevented by the commands of the Constitution from depriving the plaintiff of the right to utilize these sources of supply, even though some land owner or actual occupant may have the right to pro-

cure or might even succeed in procuring some modification of the precise plans proposed by the plaintiff, and even though by the State Court's construction of the statute a route is not "located" until after the notices are served.

In brief, the requirement of the service of the notices is obviously for the benefit of *the owners and occupants of the land* and was designed to protect them against unreasonable, wanton, or arbitrary selections of routes, dam-sites, etc., by the party seeking to acquire the lands for water-supply purposes; and the requirement can have no reference to or confer any rights upon third persons. Certainly, persons who, like the defendants, are actually attempting to use the lands for water-supply purposes cannot be heard to assert and defend their own appropriation of the land upon the ground that some *owner* of that land might so modify the plaintiff's plans as to defeat its use of the lands for the same purpose.

But if it were open to the defendants here to assert this supposed right of the landowner to modify the plaintiff's plans, and contend that for that reason the plaintiff acquired no franchise to utilize the lands covered by its maps, the assertion and contention would have to be rejected because of their inherent unsoundness. The statute gives the landowner no such right to prevent the appropriation of his land for the public use contemplated by the plaintiff.

The provision of the Act of 1895 with reference to the service of notices is as follows:

> "Said corporation shall give written notice to all actual occupants of land so designated, and which have not been purchased by or given to it, of the time and place such map or maps were filed."

It is then provided that any occupant or owner of the land aggrieved by the proposed location may, within fifteen days after receiving such notice, apply by petition to a Justice of the Supreme Court for the appointment of Commissioners to examine the land so designated. This petition is required to "state the objections to the route designated" and "designate the route to which it is proposed to alter the same," and it is required to be accompanied by "a survey, map and profile of the route designated by the corporation and of the proposed alteration thereof." Upon hearing the petition, the Justice *may* appoint three Commissioners, whose duties are: (a) "To examine the route proposed by the corporation and the route to which it is proposed to alter the same," and (b) "To affirm the route originally designated or adopt the proposed alteration thereof." The statute then provides:

> "but no alteration of the route shall be made except with the concurrence of the commissioner who is a practical civil engineer, nor shall it cause greater damage or injury to lands or materially lengthen the route designated by the corporation, nor shall it substantially change the general line adopted by the corporation."

An appeal is authorized to be taken "from the decision of the Commissioners" and on such appeal the Court "may affirm the route proposed by the corporation or may adopt that proposed by the petitioner."

It will thus be observed that although an occupant or owner of the land may obtain a *modification* of the plans proposed by the plaintiff, he cannot "materially lengthen the route" or "substan-

tially change the general line" adopted by the corporation, nor can he utterly prevent the company from acquiring *in invitum* substantially the same lands which are designated on its maps. When such a modification is sought the petition must "designate the route to which it is proposed to alter" the route proposed by the company, and the powers of both the Commissioners and the Court are expressly limited to choosing between the route proposed by the company and that proposed by the owner. The company cannot be deprived of the right to acquire and use the land designated by one or the other, nor can the change amount to a radical departure from its own plans. It is manifest, therefore, that these provisions with reference to changes in the company's plans are simply regulatory in their nature and cannot be construed as wholly destructive of the company's rights. In brief, although these provisions might enable an occupant or owner to compel the company to make a slight change in the precise location of a reservoir or dam-site or in the precise line of its aqueduct, they do not enable any owner or occupant to prevent the company from coming into a watershed and acquiring such lands as may be reasonably necessary to accumulate and use the waters thereof. Consequently, while the absence of service of notice may leave the plaintiff's right to acquire and utilize the lands designated on its maps subject to such minor modifications, it is palpably erroneous to hold that such absence of notice is fatal to the acquisition of the broad general right to utilize the waters of the various watersheds covered by its maps; for the statute expressly recognizes that broad general right as a result of filing the maps and provides in terms that the company shall

not be subject to more than *a minor modification*, and even that minor modification can be made only by *substituting* other land which will not materially change the company's plans.

It only remains now to note the

CASES RELIED UPON BY THE APPELLEES.

These cases are:

People v. *Adirondack Ry. Co.*, 160 N. Y., 225.

Adirondack Ry. Co. v. *New York*, 176 U. S., 335 (affirming judgment in preceding case).

Underground Railroad v. *City of New York*, 193 U. S., 416.

The case last cited is clearly distinguishable and may be disposed of in a few words. The plaintiff in that case claimed the right to construct and operate an underground railroad *in the City of New York* along a certain route specified in a map filed by the companies of which it was a consolidation. The suit was brought to enjoin the City of New York from constructing an underground railroad along that same route. It appeared, however, that by express provision, both of the State Constitution and of the statutes which were in force at the time of the organization of these companies, no street railroad could be constructed or operated upon or along any of the streets or avenues of the city, except upon obtaining the *consent of the abutting property owners*, and that neither the plaintiff nor the companies of which it was a consolidation had ever obtained that consent. The existing laws required also the *consent of the municipal authorities* and this had not been ob-

tained. On the contrary, it appeared that attempts had been made to obtain these consents and that these attempts had been unsuccessful. It was thus apparent upon the face of the bill that the plaintiff there had not complied with the plain requirements of the Constitution and statutes from which it claimed to derive its rights, and consequently by the express terms of these laws, had never acquired the right to utilize its proposed routes for railroad purposes. It was for this reason and upon this ground that the bill in that case was dismissed. In the case at bar the plaintiff does not claim the right to use the streets of the City, and the statutes under which it derives its rights do not require it to obtain consents from any public authorities or from the owners of the property it wishes to utilize for its corporate purposes. This vital and controlling difference between the *Underground case* and the case at bar was clearly noted in the opinion delivered by Judge HAZEL in the Circuit Court (116 Fed., 952, 959), where he said:

> "The authorities cited by counsel for complainants do not apply. They refer for most part to railroads constructed *without the limits of a municipality, and where the preliminary steps to secure vested rights differ from those required in a case like the present.*"

The opinion of this Court proceeded on the same lines as the opinion of Judge HAZEL, the Court saying (193 U. S., 429):

> "The consent of the municipal authorities and the consent of the abutting owners, or the substituted consent of the Supreme Court, were essential to the right to construct a railroad, and these it never obtained."

It was argued below that service of notices upon

the occupants of the lands designated on the plaintiff's maps was just as essential to the acquisition of a franchise by the plaintiff as the consents of the municipal authorities and abutting owners were essential to the acquisition of a franchise by the Underground Railroad Company. But the right of the plaintiff here to acquire those lands is in no way dependent upon the consent of the owners. As already shown above, the most that any landowner might do is to obtain a modification of the plaintiff's plans without making a "substantial change," and by no possibility could the plaintiff be actually driven out of a watershed or prevented from obtaining the land necessary to accumulate the waters thereof. In the very language of the statute, a complaining landowner *must* "designate the route to which it is proposed to alter" the one proposed by the company, and the plaintiff is entitled as of right either to the land designated on its own map or to that designated on the proposed alteration without "substantial change."

It is apparent, therefore, that in the case at bar, the plaintiff's right to utilize the lands in question does not depend upon the consent of anyone. It has plenary power to acquire the land for its corporate purposes by exercising the power of eminent domain. Hence, the decision in the *Underground case*, is in no way applicable here.

The *Adirondack Ry. Co. case* (160 N. Y., 225; 176 U. S., 335), presented a controversy between the Railway Company and the State of New York with respect to a strip of land embraced in the State Forest Preserve, which the company sought to use for railroad purposes and which the State had set apart for park purposes. The Adirondack

Railway Company was incorporated in 1882 to construct and operate a railroad from Saratoga Springs to the St. Lawrence River. It acquired, by a reorganization of the Adirondack Company, a railroad from Saratoga Springs to North Creek in Warren County, "with the right to extend the same." In May, 1892, it obtained from the State Railroad Commissioners a certificate *relieving it from the statutory obligation of thus extending its lines.* The State Forest Preserve was created by statute in 1885 and was subsequently extended by other statutes passed in 1887 and 1893. The land in controversy was wholly within this forest preserve (160 N. Y., at p. 232), and these statutes expressly provided that the lands embraced therein should be "forever kept as wild forest lands," and "should not be sold, leased *or taken by any corporation, public or private.*" In 1890 the Forest Commission was authorized to purchase lands included in the Preserve, and in 1892 the Adirondack Park was established and placed under the control of said Commission. The State Constitution which went into effect January, 1895, also contained a provision that "the lands now owned *or hereafter acquired,* constituting the Forest Preserve as now fixed by law shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, *or be taken by any corporation, public or private;* nor shall the timber thereon be sold, removed or destroyed." In 1897 an act was passed, "to provide for the acquisition of land in the territory embraced in the Adirondack Park and making an appropriation therefor." This act took effect April 8, 1897. In August, 1897, the Forest Preserve Board created by said act accepted an offer for the sale

of certain lands located in Township 15 and embraced in the Forest Preserve. On September 18, 1897, the defendant caused a map to be filed in the Counties of Hamilton, Warren and Essex for the extension of its road across Township 15 *over the land which the Forest Preserve Board had agreed to purchase.* Thereafter, on October 7, the Forest Preserve Board appropriated the land in question for a park under the power of eminent domain vested in them in accordance with the provisions of the Act of 1897. On the same day, but "not until after the aforesaid proceeding in behalf of the State had been completed," the defendant began proceedings to condemn said strip of land for the purposes of extending its road. Suit was then brought by the State to enjoin the defendant from continuing said proceedings. The Appellate Division, acting upon the authority of the decisions of the Court of Appeals in the cases we have cited above, held that the defendant had acquired such a right to the land in question as gave to the company the right to build its road thereon (39 App. Div., 34). This decision, however, was reversed by the Court of Appeals, and upon the facts there presented it held that the defendant had acquired no rights which it could hold as against the State. Two of the Judges concurred in the result only, and not in the opinion that was delivered (160 N. Y., 225-248).

The case was undoubtedly rightly decided, but everything said in the opinion cannot be regarded as sound law. The land in controversy clearly had become a part of the State Forest Preserve by virtue of the Statutes of 1885, 1887, and 1893, long before the defendant there had filed its map. The

land had been thus withdrawn from the right of any creature of the State to appropriate it by any means or for any purpose, and had become subject to the solemn and emphatic command of the State Constitution that it should not be "taken by any corporation, public or private." The State, it is true, had not acutally condemned the land or acquired a proprietary title thereto at the time the defendant filed its map, but that is utterly immaterial. The important and controlling fact is that by the statutes creating the Forest Preserve and Adirondack Park, the State had effectively set the land apart for park purposes and thus withdrawn it from subsequent appropriation for railroad purposes. The constitutional prohibition against taking the land for other than park purposes applies not only to lands actually owned by the State as proprietor but to *all* lands embraced within the Forest Preserve as then fixed by law whether owned by the State or "hereafter acquired." It is thus manifest that at the time the defendant filed its map in 1897, the land was already devoted by the State to a public use inconsistent with its use for railroad purposes. And this Court so held (176 U. S., 349):

> "The lands taken for the park were thereby dedicated to a public use regarded by the State as of such vital importance to the people that they were expressly put by the Constitution beyond the reach of any other destination.
> * * *
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> "In this case the use for the park was in itself inconsistent with the use for railroad purposes, and the legislation and the Constitution alike forbade this company to acquire for its own use any portion of that which the State had taken for its own exclusive and designated purposes."

The filing of the defendant's map in that case was consequently an act wholly unauthorized by any statute and in fact positively forbidden. The defendant had no right or authority to acquire or use the land designated on the map, because the Constitution expressly forbade it. It seems obvious that under these circumstances the filing of the defendant's map could give it no rights whatever. It is only an *authorized* filing that could ever have any effect. In addition to this, at the time the map was filed the defendant, upon its own application, had been "relieved for all time by the action of the Railroad Commissioners from the obligation of extending its road." Thus, said defendant had voluntarily relinquished its contract with the State and could not complain that the State treated it as no longer in force (160 N. Y., 242, 176 U. S., 344).

There is thus a clear and controlling distinction between the facts in the *Adirondack case* and the facts in the case at bar, and these distinguishing features were pointedly emphasized both by the Court of Appeals and by this Court in reaching their conclusions against the company in that case. Insofar, therefore, as that case holds that the company there had not acquired any rights it is based upon facts and principles which are not presented here and for that reason the case is not in point.

It was, nevertheless, contended below, that the *Adirondack case* lays down the broad general principle that the filing of maps under the statutes under which the plaintiff acted does not constitute or create a contract or give any right to or against the lands designated thereon. If that contention be correct, the necessary effect of the decision is to

overrule all the fundamental principles upon which the Court proceeded in *Rochester, H. & L. R. R. Co.* v. *N. Y., etc., Co.,* 110 N. Y., 128; and *Suburban Rapid Transit Co.* v. *Mayor, etc.,* 128 N. Y., 510. The contention is, therefore, at least presumptively unsound, and an examination of the decision demonstrates it to be so.

The principal contention of the defendant in the *Adirondack case* was that the Act of 1897 under which the State condemned the land was unconstitutional, because it authorized a taking of private property without due process of law and without making compensation therefor, and aside from the elaborate statement of the facts the opinions of both this Court and the Court of Appeals are devoted mainly to a discussion of that question. The validity of the law was sustained upon the ground that due process of law does not require that an owner have a day in Court upon the question of appropriation by the State (160 N. Y., 239) and when the treasury of the State is pledged to meet the claim for compensation, payment of compensation need not proceed or be concurrent with the taking (160 N. Y., 241, 176 U. S., 347, 349). This holding was in fact sufficient to dispose of the case, for the State's taking of the property being sustained it was clearly entitled to an injunction restraining the defendant from attempting to acquire the property. But the Court of Appeals and this Court both went further than was necessary and discussed *obiter*, the question as to what rights, if any, the defendant possessed.

Upon that question the defendant's contention was that it had acquired "a *lien*, good even as against the State, which entitled it to notice and compensation as an owner" (160 N. Y., 242). In

answer to that contention the Court of Appeals said that if there were a lien it was "created by statute and not by contract" and could, therefore, be done away with by statute without liability to make compensation unless some vested right had accrued under it (160 N. Y., 243). It then proceeded:

> "We do not think, however, that any lien, or any right in the nature of a lien, can be created as against the State by the simple filing of a map by a corporation organized to construct a railroad. As there is no language expressly giving it that effect, in the nature of things the Legislature did not intend to clothe a creature of the State with the right to hold up the paramount power and compel it to pay money for the bare filing of a map, which is not the commencement of condemnation proceedings, for it is filed under the Railroad Law, while condemnation is had under the Code of Civil Procedure (R. R. Law, Sec. 6; Code Civ. Pro., Sections 3357, 3284). A proceeding cannot be held to be continuous when the first act may be done over nine hundred years before the second step is taken. Even if it were inchoate condemnation, it could not be used against the State, because a delegated power of eminent domain cannot be turned against the sovereign which conferred it and which is the source of all power. What then, it may be asked, was the effect of filing the map, and what function did it perform? The effect of the map when filed was to give warning to other railroads that a certain route had been pre-empted by the defendant. It established no right against the owner, because the Constitution forbids it; it established none against the State, because its power is paramount, but *as against all other railroad companies and as against all other creatures of the State, empowered to use*

the right of eminent domain, it gave the exclusive right to occupy the particular strip of land for railroad purposes until the Legislature authorized it to be devoted to some other public use.

"The general language used in certain cases relied upon by the defendant should be read in the light of the facts then before the Court (*Rochester, H. & L. R. R. Co. v. New York, L. E. & W. R. R. Co.*, 110 N. Y., 128; *Suburban Rapid Transit Co. v. Mayor, etc.*, 128 N. Y., 510). These cases simply involved controversies between corporations created by the State as to a located line, the legislation necessary to enable one corporation to condemn land previously condemned by another and the like. The State was not a party to any of them, and the only question involved was as to which corporation was ahead. The so-called lien was simply an exclusive right of one of two contending railroad corporations, as against the other, to build a road on a certain piece of land, or of a railroad corporation to hold land already condemned for a public use, as against a city seeking to condemn it for another public use, without special authority from the Legislature. The general effect of filing a map was not involved, but the particular effect as between two corporations, each trying to get the same land. The paramount right of the State to modify statutes, before vested rights have been acquired under them, was not involved. Here the question arises between the State and one of its creatures, and the claim that a lien, good as against the creator of the corporation, was placed upon the land simply by the grant of a franchise to exist as a corporation in order to build a road, followed by the filing of a map of the proposed route and notice thereof to the occupants, but by nothing else, cannot be sustained. There is no prop-

erty in a naked railroad route, existing on paper only, that the State is obliged to pay for when it needs the land covered by that route for a great public use, and its officers are authorized to act by appropriate legislation."

It will thus be observed that throughout its opinion the Court of Appeals discussed the effect of the filing of the defendant's map in terms of *lien* and used the analogy of the statutory lien of a judgment; and such discussion is explicable and understandable only by bearing in mind that the question then under consideration was not as to the defendant's right to utilize the land in question for its railroad (that had been already disposed of by showing that the land had been previously set apart by the State for an inconsistent use), but was as to the existence of a *proprietary interest* in the land itself. In other words, the entire opinion proceeds upon the basic fact that the land had been set apart for park purposes before the defendant acted, and the question under discussion was whether the filing of a map *after* such withdrawal of the land from possible acquisition for railroad purposes could give the company any interest in or lien upon the land for which the State would have to make compensation upon acquiring title to the land. (See note below.)

Note.—That the question dwelt upon in the opinion in the **Adirondack case** was not as to the defendants' right to utilize the land for its railroad, but was a question as to the existence of a **proprietary interest** in the land itself, is emphasized by reference to some of the cases which Judge Vann cited. Thus, the cases of N. Y. C. & H. R. R. R. Co. v. Aldridge, 135 N. Y., 83, and Archibald v. N. Y. C. & H. R. R. R. Co., 157 N. Y., 574, cited by Judge Vann, were actions of ejectment in which the New York Central & Hudson River Railroad Company claimed, not only a right to use the land in question in those cases, but, also, the **actual title** to the property

But wholly aside from the circumstance that the map in the case then before the Court was filed after the land had been thus set apart for a public use inconsistent with that proposed by the defendant, and even if it be assumed that the Court intended to hold that even a prior filing of the map would not give any property rights as against the State, it is apparent that the expression, "there is no property in a naked railroad route," was not intended as the enunciation of a principle of universal application, but, on the contrary, was expressly excluded from application to a situation such as is presented in the case at bar.

The Court did not overrule *Rochester, H. & L. R. R. Co.* v. *New York, etc., Co.*, and *Suburban Rapid Transit Co.* v. *Mayor, etc.*, but, as appears from the above quotation, expressly recognized their authority and distinguished them upon the ground that in the case then before them the controversy was directly between *the State itself* and

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as an owner thereof. In each case the property in controversy was land originally under water and subsequently raised by filling in, and the Railroad Company based its title—not only upon the rights acquired by it by the filing of a map, but, also, upon an express grant from the State through the Commissioners of the Land Office. The individuals claimed under similar grants from the State. The Court held (and the plaintiff here has never pretended to assert the contrary) that the filing of the map did not give title to the land, and as the State's grants to the individuals were prior in time to the grants to the company, it followed that the title of the individuals was superior. No question was raised, however, as to the right of the company to utilize the land for railroad purposes.

It must be noted, too, that if Judge Vann were not speaking with reference to the effect of the filing of a map after the State had appropriated the land, as distinguished from the effect of such filing before the State had appropriated it, his statement on page 243 that if the filing created a lien good as against the State it created one good as against the owner of the fee with no obligation to make compensation, is a complete non sequitur and palpably erroneous. In Bauman v. Ross, 167 U. S., 548, 596, 597, this Court expressly held, with reference to street maps filed by Commissioners of the District of Columbia, that the filing of such maps in

one of its creatures, while in those earlier cases, as in the case at bar, the controversy was between two creatures of the State, each trying to get the same land. And the Court also expressly said (160 N. Y., 246, Approved 176 U. S., 346):

> "The effect of the map when filed was to give warning to other railroads that a certain route had been pre-empted by the defendant. It established no right against the owner, because the Constitution forbids it; it established none against the State, because its power is paramount, *but as against all other railroad companies and as against all other creatures of the State, empowered to use the right of eminent domain, it gave the exclusive right to occupy the particular strip of land for railroad purposes* until the Legislature authorized it to be devoted to some other public use."

It will thus be observed that the Court expressly differentiated between a direct exercise of the

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no way affected the owners' title to the land but simply prevented interference with the proposed use of the land for street purposes. So, too, in all the preceding authorities it has been recognized that the mere filing of a map could give no right as against the owner until compensation was paid (see particularly Williamsport, etc., Co. v. Philadelphia, etc., Co., 141 Pa., 407, cited supra), and there is no logical reason why the filing of a map should not give to the party filing it a vested right to the use of the land, exclusive of all other persons seeking to acquire the same land for public use, without its giving any right, either as a lien or otherwise, as against the owner of the fee whose title, it is conceded, could never be taken or impaired except upon the payment of just compensation. Indeed, to refer to the right acquired by the filing of a map as a lien, like a mortgage or judgment, is a complete misnomer and involves a totally erroneous conception of the nature of the right. The filing of a map does not create an incumbrance upon the land so far as concerns the title of the owner or his right to sell or mortgage his property, nor have any of the cases intimated that such was its effect. The sole effect claimed for the filing of a map is the appropriation of the land not as against the owner, but as against all other subsequent attempts by third persons to acquire the land free from the right of the corporation filing the map to utilize the land for its corporate purposes.

power of eminent domain by the State itself and an exercise of that power by any creature of the State. In so doing it made a line of demarkation between the sovereign State on one side and corporations, public and private, on the other. If, therefore, the Court of Appeals has in that case modified the law at all, it has modified it to this extent only, that the filing of a map gives no right as against the sovereign State, but does give a right "as against all other creatures of the State empowered to use the right of eminent domain." It is not necessary here to point out the considerations which may have induced the Court to make a distinction between a direct exercise of the power of eminent domain by the State itself and a delegated exercise of the same power by a municipality. For the purpose of this case it is sufficient to say that the Court has made the distinction.

In the case at bar the State is not a party and has no interest and makes no claim. It is not here seeking to appropriate for its own purposes the lands and waters to which the plaintiff's franchise relates. It seeks no proprietary interest in those lands and waters and is not attempting to obtain them for itself. The persons who are here attempting to wrest the plaintiff's rights from it are *lesser "creatures of the State* empowered to use the right of eminent domain," and the purpose for which these lesser creatures are attempting to appropriate these lands and waters is their own benefit and advantage, and for *the same public use* as that proposed by the plaintiff.

For this reason, if for no other, the *Adirondack case* is not controlling and in no way militates against the position of the plaintiff here. On the

contrary, as already pointed out, the Court of Appeals in that case, far from denying the proposition for which we here contend, expressly stated and declared and reiterated its previous holdings that the effect of the filing of the maps was to preempt the land covered thereby and give to the corporation filing the map "the exclusive right to occupy the particular strip of land" for its own corporate purposes.

It is true that in making this statement the Court added, "until the Legislature authorized it to be devoted to some other public use" (160 N. Y., 246), and this was somewhat relied upon below. But there is no pretense that the land here has been authorized to be devoted to "some other public use." The use to which the defendants propose to put the lands is the same as that proposed by the plaintiff, viz., a use for water supply purposes. Moreover, this so-called qualifying clause clearly does not mean that the Legislature might at any time terminate and extinguish this right of exclusive use by authorizing some other of its creatures to utilize the same land for the same purposes, at least without payment of compensation therefor. The learned Judge who wrote that opinion and the other learned Judges of the Court of Appeals could never have been guilty of such a violation of fundamental constitutional rights. The clause is obviously simply a recognition of the well-settled rule that all property of whatever kind, whether devoted to a public use or not and whether consisting of real estate or franchises, is always subject to the power of eminent domain and liable to be taken under that power upon making just compensation (*Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S.,

685). And we may here say parenthetically that of course the plaintiff here does not contend that its franchises could not be taken by the defendants by taking lawful proceedings under authority from the Legislature and paying to it just compensation as required by the Constitution; in other words, we do not contend that by securing its franchise to utilize these lands and waters the plaintiff has withdrawn them from the reach of the power of eminent domain. Our only contention is that the franchise cannot be taken without special authority or without just compensation, and that that is what the defendants here are endeavoring to do*.

If, however, we be in error as to the meaning and effect of the decision in the *Adirondack* case, if our conception as to what the Court there decided be erroneous, if that decision be authority for the proposition that the plaintiff's acts were ineffectual and did not vest in it a right and franchise to utilize for its corporate purposes the lands and waters covered by its maps, then that decision has effected *a radical change in the law of the State* as such law had been theretofore announced and declared; and for this reason it should not and cannot be followed by this Court in its determination of this case. In 1887 and 1888, and again in 1891,

*There is of course this limitation that the State cannot, under the guise of the power of eminent domain, authorize the transfer of privately owned property from one owner to another private owner who is to continue to use it for the same purpose, even though that purpose be a public one. Lewis, Eminent Domain, Sec. 440; West River Bridge Co. v. Dix, 6. How., 507, 537; Suburban R. R. Co. v. Metropolitan El. R. Co., 193 Ill., 217, 233; Cary Library v. Bliss, 151 Mass., 364, 379. So, too, the **Adirondack case** itself illustrates another limitation upon the power of eminent domain, viz., the State constitution itself may expressly designate certain property for a certain use, and then no one can acquire the property for a different use.

the Courts of New York announced and declared that the effect of the filing of maps under the provisions of the statutes under which the plaintiff claims was to give to the corporation filing such maps a vested and exclusive right and franchise to the exclusive use and occupation of the lands covered by such maps for its own corporate purposes free from the interference of any other person or corporation (*Rochester H. & L. R. R. Co.* v. *New York, etc., Co.; Suburban Rapid Transit Co.* v. *Mayor, etc., supra*). These decisions stood unquestioned and unimpugned through all the years during which the plaintiff acquired its rights. The plaintiff was entitled to rely and did rely upon them. To permit subsequent decisions to impair the rights acquired by the plaintiff would be unjust, and it is well settled that under such circumstances the Federal Courts are not bound to follow the decisions of the State Courts, but on the contrary are bound to disregard them.

This doctrine was established at an early date in *Gelpke* v. *Dubuque*, 1 Wall., 175, and has been adhered to ever since.

In *Douglass* v. *County of Pike*, 101 U. S., 677, the Court said (p. 686):

> "As a rule, we treat the construction which the highest Court of a State has given a statute of the State as part of the statute, and govern ourselves accordingly; but where different constructions have been given to the same statute at different times, *we have never felt ourselves bound to follow the latest decisions, if thereby contract rights which have accrued under earlier rulings will be injuriously affected.*"

And at page 687:

> "The true rule is to give a change of judi-

cial construction, in respect to a statute, the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. *After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment.*

"So far as this case is concerned, we have no hesitation in saying that *the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper.*"

In *Burgess* v. *Seligman*, 107 U. S., 20, 23, it was said:

"We do not consider ourselves bound to follow the decision of the State Court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the State tribunals contrary to that given by the Circuit Court. The Federal Courts have an independent jurisdiction in the administration of State laws, co-ordinate with and not subordinate to that of the State Courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. * * * So when contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions or when there has been no decision of the State tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a

different interpretation may be adopted by the State Courts after such rights have accrued."

In *McCullough* v. *Virginia*, 172 U. S., 102, 109, it was said:

"While it is undoubtedly the general rule of this Court to accept the construction placed by the Courts of a State upon its statutes and Constitution, yet one exception to this rule has always been recognized, and that in reference to the matter of contracts alleged to have been impaired."

In *Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S., 558, it was said (p. 575):

"It follows, therefore, that at the time of the contract of 1868 and of the passage of the ratifying Act of 1870 it was established by the decision of the highest Court of the State that the Constitution of the State permitted a grant of special franchises to persons and corporations and permitted the latter to receive assignments of them from such persons, or grants of them directly from the Legislature. *This law was part of the contract of 1868, as confirmed by the Act of 1870, and could not be affected by subsequent decisions.*"

In *Kuhn* v. *Fairmont Coal Co.*, 215 U. S., 349, the Court said, at page 360:

"We take it, then, that it is no longer to be questioned that the Federal Courts, in determining cases before them, are to be guided by the following rules: * * * 4. So, *when contracts and transactions are entered into and rights have accrued under a particular state of the local decisions*, or when there has been no decision by the State Court on the particular question involved, then the Federal Courts properly claim the right to give effect to their own judgment as to what is the law of the State applicable to the case, even where

a different view has been expressed by the State Court after the rights of parties accrued."

An emphatic illustration of the doctrine of the foregoing cases is presented by the decision in *Muhlker* v. *New York & H. R. Co.*, 197 U. S., 544, in which this Court reversed the New York Court of Appeals, because that Court had impaired rights by what this Court regarded as a *change* of its prior decisions although the Court of Appeals had purported simply to *distinguish* the earlier cases. In the opinion of this Court, it was said:

> "*When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.*
>
> "And this is the ground of our decision. We are not called upon to discuss the power, or the limitations upon the power, of the Courts of New York to declare rules of property or change or modify their decisions, but only to *decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States.* And we determine for ourselves the existence and extent of such contract. This is a truism; and *when there is a diversity of State decisions the first in time may constitute the obligation of the contract and the measure of rights under it.*"

In conclusion, then, with reference to the *Adirondack case*, our position is:

1. That case clearly recognizes that as against all creatures of the State empowered to use the right of eminent domain (including, of course, the

defendants here) the effect of filing a map is to give to the corporation filing it the exclusive right to occupy the land covered by the map for the purposes of that corporation.

2. Insofar as it holds that the company there had not acquired any rights, it is distinguishable upon its facts, and therefore, not in point here.

3. If that decision is to be construed as warranting a decision here that the acts performed by the plaintiff in the case at bar did not vest in it a right and franchise, good as against the defendants in this suit, to utilize the lands and waters covered by its maps, then that case constitutes a *change of decision* by the State Court since the plaintiff's rights accrued and for this reason cannot be applied here to the prejudice of the plaintiff.

POINT III.

The franchise so acquired by the plaintiff constitutes a contract and a vested property right protected by the Federal Constitution, and was not destroyed by the repealing acts mentioned in the bill.

It is quite true, as stated by the District Court, that:

> "The Legislature of New York had at the time in question full power to alter and repeal its statutes (Cons. of 1846, Art. 8, Sec. 1), and all charters (Rev. Stat., Sec. 8, Tit. 3, Chap. 18), and Section 19, of Chapter 40, Laws of 1848, under which the complainant was incorporated expressly reserved to the Legislature the right to alter or repeal the act."

It is true, also, that the general statutes, under which the plaintiff was incorporated were repealed on June 7, 1890 (with a saving clause, however, which the plaintiff contends practically kept the statute in force as to it. See Bill, Par. Eighth), and that the Act of 1895, which was passed for the plaintiff's benefit, was repealed in 1901 (Bill, Par. Twenty-second).

But whatever may be the true construction of the text of those repealing acts, it is plain that none of these reservations of the power to alter, amend or repeal, gave or could give to the State the right to deprive the plaintiff of its franchise, because any such deprivation would violate the contract and due process clauses of the Constitution of the United States. For convenience we quote the clauses here:

> "No State shall * * * pass any * * * law impairing the obligation of contracts" (Art I, Sec. 10).
>
> "Nor shall any State deprive any person of life, liberty or property without due process of law" (14th Amendment).

This Court long ago held that the reserved power to alter, amend, or repeal "cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made."

> *Sinking Fund Cases*, 99 U. S., 700.
>
> *St. Louis, Iron Mt., etc., Ry. Co.* v. *Paul*, 173 U. S., 404, 408, 409.

It has also declared vested rights to be "beyond the sphere of the reserved powers."

> *Stanislaus Co.* v. *San Joaquin, etc., Co.*, 192 U. S., 201, 213.

And it has laid down the rule that while the power may be exercised to make alterations or amendments that will not "defeat or substantially impair the object of the grant or any rights which have accrued under it," the exercise of the power must be reasonable and in good faith and "consistent with the scope and object of the act of incorporation."

> *Fair Haven R. R. Co.* v. *New Haven*, 203 U. S., 379, 388.

In brief, the power may be used to regulate the manner of exercising a franchise but cannot be used to defeat it: the power to *regulate* does not include the power to *destroy*.

> *Owensboro* v. *Cumberland Tel. Co.*, 230 U. S., 58.
> *Grand Trunk Western Ry.* v. *South Bend*, 227 U. S., 544, 552.

The Courts of New York, also, have been most emphatic in denying to the Legislature of that State the right to invade franchises by an exercise of the powers reserved in the State Constitution and laws mentioned above.

Any discussion of this subject as relating to the statutes of New York is naturally commenced with a reference to the case of *People* v. *O'Brien*, 111 N. Y., 1, which is a leading case in that State and has been many times cited with approval by this Court. That case involved the validity of certain acts of the Legislature of New York attempting to dissolve the Broadway Surface Railroad Company and terminate its franchises. The Court sustained the acts insofar as they dissolved the corporate existence of the company, but declared them unconsti-

tutional insofar as they attempted to destroy the company's franchises. We excerpt the following from the famous opinion of Chief Judge RUGER in announcing the judgment of the Court:

> "Whatever might have been the intention of the Legislature or even of the framers of our Constitution in respect to the effect of the power of repeal reserved in acts of incorporation, upon the property rights of a corporation, such power must still be exercised in subjection to the provisions of the Federal Constitution (p. 36).
>
> "* * * We think that there are no reported cases in which the judgment of the Court has ever taken the franchises or property of a corporation from its stockholders and creditors, through the exercise of the reserved power of amendment and repeal, or transferred it to other persons or corporations, without provision made for compensation (p. 37).
>
> "When we consider the generality with which investments have been made in securities based upon corporate franchises throughout the whole country, the numerous laws adopted in the several States providing for their security and enjoyment, and the extent of litigation conducted in the various Courts, State and Federal, in which they have been upheld and enforced, there is no question, but that in the view of the Legislatures, Courts and the public at large, certain corporate franchises have been uniformly regarded as indestructible by legislative authority, and as constituting property in the highest sense of the term.
>
> "It is, however, earnestly contended for the State that such a franchise is a mere license or privilege enjoyable during the life of the grantee only, and revocable at the will of the State. We believe this proposition to be not

only repugnant to justice and reason, but contrary to the uniform course of authority in this country. The laws of this State have made such interests taxable, inheritable, alienable, subject to levy and sale under execution, to condemnation under the exercise of the right of eminent domain, and invested them with the attributes of property generally" (pp. 40, 41).

"It is also to be observed that in none of the provisions for repeal in this State is there anything contained, which purports to confer power to take away or destroy property or annul contracts, and the contention that the property of a dissolved corporation is forfeited, rests wholly upon what is claimed to be the necessary consequence of the extinction of corporate life. We do not think the dissolution of a corporation works any such effect. It would not naturally seem to have any other operation upon its contracts or property rights than the death of a natural person upon his (*Mumma* v. *Potomac Co.*, 8 Pet., 281, 285).

"The power to repeal the charter of a corporation cannot, upon any legal principle, include the power to repeal what is in its nature irrepealable, or to undo what has been lawfully done under power lawfully conferred (*Butler* v. *Palmer*, 1 Hill, 335).

"The authorities seem to be uniform to the effect that a reservation of the right to repeal, enables a Legislature to effect a destruction of the corporate life, and disable it from continuing its corporate business (*People ex rel. Kimball* v. *B. & A. R. R. Co.*, 70 N. Y., 569; *Phillips* v. *Wickham*, 1 Paige, 590), and a reservation of the right to alter and amend confers power to pass all needful laws for the regulation and control of the domestic affairs of a corporation, freed from the restrictions imposed by the Federal Constitution upon legislation impairing the obligation of contracts (*Munn* v. *Illinois*, 94 U. S., 113, 123).

"*We think no well considered case has gone further than this, while in many cases such power has been expressly held to be limited to the effect stated.* In the language of Chief Justice Marshall in *Fletcher* v. *Peck* (6 Cranch., 87, 135): 'If an act be done under a law, a succeeding Legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made; those conveyances have vested legal estate, and if those estates may be seized by the sovereign authority, still that they originally vested is a fact, and cannot cease to be a fact. *When, then, a law is in the nature of a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights.*'

"It would seem to be quite obvious that a power existing in the Legislature by virtue of a reservation only, could not be made the foundation of an authority to do that which is expressly inhibited by the Constitution, or afford the basis of a claim to increase jurisdiction over the lives, liberty or property of citizens beyond the scope of express constitutional power" (pp. 47-49).

"If it is possible to conceive the idea of a repealable grant, certainly such a grant, accompanied with power to convey or pledge the interest granted, must, on the execution of the power, necessarily preclude a resumption by the grantor of the subject of the grant, or any right of property acquired under it. *An express reservation by the Legislature of power to take away or destroy property lawfully acquired or created would necessarily violate the fundamental law, and it is equally clear that any legislation which authorizes such a result to be accomplished indirectly, would be equally ineffectual and void*" (p. 51).

"Upon such examination we are of the opinion that Chapter 271 of the Laws of 1886 is

unconstitutional and void. *Its provisions show a naked and undisguised attempt to take away from the Broadway Surface Company and its stockholders and creditors, its property and bestow the benefit thereof upon the municipality of New York*" (p. 58).

"These conclusions must result in the condemnation of the scheme by which it was attempted to wind up the affairs of the Broadway Surface Railroad Company, as the provision for bringing an action by the Attorney General to wind up its affairs was incidental merely, and so intimately connected with the general plan of the scheme, that it cannot be supposed it would have been enacted except in connection with the other provisions of the act. *We, therefore, think this law is obnoxious to the objection, that it assumes to take property without due process of law, and impairs the obligation of contracts*" (p. 63).

If, therefore, the right acquired by the plaintiff be in reality a vested right, a right of property, or a contract, it cannot be doubted that it was not subject to repeal and was not destroyed by the repealing acts. And in view of the repeated decisions of this Court it is not open to dispute that this right does constitute a contract—a right which, however named, is property, and, as such, is inviolable and within the protection of the Federal Constitution.

Russell v. Sebastian, 233 U. S., 195;
N. Y. Electric Lines Co. v. Empire City Subway, 235 U. S., 179, 191, 193; and other cases cited under Point II.

These cases, indeed, foreclose all discussion. In them the argument that a right or franchise to lay pipes, to use streets, to construct railroads, to supply water, or the like, does not become vested

until the pipes are laid, the streets actually used, the railroad constructed, or the water supplied, is met and refuted, and the doctrine established that such rights are contractual *from the moment the grant thereof is accepted.*

See, also,

Suburban Rapid Transit Co. v. *Mayor, etc., supra.*

It seems, therefore, like a work of supererogation to pursue the subject further; but as it is the New York statute as to reserved powers with which we are now dealing it may not be out of place to refer to additional cases showing how the Courts of that State have dealt with the subject.

In *Lord* v. *Equitable Life Assurance Society*, 194 N. Y., 212, it was held that the right of a stockholder of a corporation to vote is a vested right of property of which he cannot be deprived under the reserved power to alter, amend or repeal charters or statutes. In rendering that decision the Court said, page 227:

> "The right to amend a charter, however, does not include the right to *take away money invested in reliance thereon*, or property acquired thereunder. The power of amendment reserved by the Constitution or statutes of a State does not permit interference with property or property rights, because they are protected by the Constitution of the United States. When the Legislature has created a corporation and has given it power to acquire property, it cannot take away the property so acquired without providing for compensation."

In *Rochester and Lake Ontario Water Co.* v. *City of Rochester*, 176 N. Y., 36, the plaintiff was

organized under the Transportation Corporations Law for the purpose of supplying water to certain villages lying upon opposite sides of the City of Rochester, for which purpose it had obtained the permit required by that law. Under the statute it had a right to lay its pipes in the streets of any city, town, or village, adjoining the one which it was to supply when it was necessary to do so in order to reach the municipality it was to supply with water. Under authority of this statute the plaintiff attempted to lay pipes through the City of Rochester. The City thereupon obtained from the Legislature an amendment to its charter providing that any right, license or permission to any person or corporation to enter upon and lay pipes for the conveyance of water in the public streets of the City was thereby repealed and that all acts inconsistent with that act were also repealed. In speaking of this legislation the Court said:

> "It was evidently intended to meet the circumstances of this case and to prevent the plaintiff from laying its pipes within the territory of the city. It remains, therefore, to be determined whether this legislation can be given force and effect. As we have seen, the plaintiff corporation had been perfected and it had paid the State the taxes imposed therefor. It had caused surveys to be made and a map filed, locating its route, and had entered into a contract for the construction of its plant, including the laying of its pipes. It had acquired its right of way and had entered into contracts for the supplying of water, in accordance with its charter. *It had expended money and incurred obligations.* All this had taken place before the legislation of 1903. The plaintiff, *in incurring these obligations and in making these expenditures, had the right to rely upon the faith of the franchise which it*

had acquired, under which it had the right to supply the localities with water. We think these rights had become vested and were property within the meaning of the Constitution, which prohibits the deprivation of a person of property without due process of law (*People* v. *O'Brien*, 111 N. Y., 1)."

It will thus be observed that the Court expressly ruled that a statutory authority to lay pipes, upon the faith of which money had been expended in the preliminary work of the company, became by such expenditure a vested right of property not subject to repeal even though the repealing act was passed before the company had laid its pipes or commenced to supply water.

In *Ingersoll* v. *Nassau Electric R. R. Co.*, 157 N. Y., 453, the Court squarely held that a "right to contract," such as the right of the plaintiff here to contract with municipalities to supply them with water, is in itself a property right not subject to legislative repeal even though no contract has yet been actually made.

The earlier case of *Roddy* v. *Brooklyn City and Newtown R. R. Co.*, 32 App. Div., 311, which was cited by the Court of Appeals, likewise involved a question as to whether a statutory authority of a railroad company to contract for the use of its road, could, under the reserved power, be made subject to the consent of the abutting owners, and it was held it could not be. In an opinion concurred in by the present Chief Judge and an ex-Chief Judge of the Court of Appeals of New York, it was said:

"At the time when the Brooklyn City and Newtown Railroad Company and the Brooklyn City Railroad Company were organized, Chapter 218 of the Laws of 1839 was in force,

and *whatever property right accrued to or rested in these corporations at that time, by virtue of their charters or other law*, to all of which the lessee company became entitled by reason of its lease, *could not be thereafter taken away or impaired, either by legislative enactment or constitutional change*, except in the proper exercise of the right of eminent domain and of the police power. (*People* v. *O'Brien*, 111 N. Y.; *Mayor* v. *Twenty-third Street R. Co.*, 113 *id.*, 316.) The reserved right in the Legislature to alter or repeal the charters of such corporations may, and often does, raise grave questions respecting the limit of its exercise and in determining the quality of the legal right reserved. But so far as property right is concerned, there can be no question. The Constitution of the State has always protected such rights against the action of the Legislature, under whatever guise it has been attempted, while the Federal Constitution operates as a restraint upon constitutional legislation if resort be had to such action."

And then, after quoting the statute, the Court said (p. 314):

"The plain language of the right then conferred did not require for its enjoyment the consent of the municipality or of the property owners upon the street; its exercise rested alone upon the ability of the corporations to reach an agreement and carry that agreement into effect. Did this right thus reserved to these corporations when they respectively received their charters vest in them a property right? For it is clear that they became as much entitled to the benefit of whatever property right was obtained by this law as they did of any right vested in them by their charters; indeed, this was a privilege embodied in it. It has never been doubted but that the

right to lease is a property right, and the right to contract for the use of property, either exclusive or limited, is analogous in character, even though it be not technically a lease. The value of property is very largely dependent upon the use to which it may be put, and *any limitation upon the authority to contract for its use must in the very nature of things impair its value.* In this respect it stands upon the same footing as salable value. A contract for the use of property, by which one obtains the right to its enjoyment, has the elements of sale in it, as the owner's right therein is qualified by the right of use of the other party, and to that extent his interest or right of enjoyment therein is diminished. The impairment of such rights has uniformly been held to violate the constitutional prohibition. (*Wynehamer* v. *The People*, 13 N. Y., 378.) Whatever prevents the free use of lands and goods is a deprivation of property (*Bertholf* v. *O'Reilly*, 74 N. Y., 509). The right to sell, to lease, to buy or to hire out for a profit is an essential attribute of property, and whatever takes it away deprives the owner of his property. (*Matter of Application of Jacobs*, 98 N. Y., 98.) But aside from this consideration, the right to use the railroad for all the purposes authorized by law was the franchise and privileges which those corporations obtained. That this was a property right which could not be taken away or impaired is answered in the affirmative by every authority upon the subject of which we have knowledge. (*People* v. *O'Brien*, 111 N. Y., 1; *Boyer* v. *Village of Little Falls*, 5 App. Div., 1.) The right or privilege to contract for its use with other railroads, and thereby derive a profit, was as much a part of its franchise as was the right to lay its tracks or operate its cars. This was a source of use which made its

property and franchise valuable, and the corporation could no more be deprived of this right than the right of operating in any other respect as authorized by law.

"*The claim that the act was permissive only, and that, therefore, no vested right could be obtained, cannot be sustained. If it was permissive only, it was still permissive in granting the authority to obtain a property right,* and it would be a singular doctrine which permits the acquirement of property by permission and then destroys it by withdrawing the permission through which it was obtained. This view of the law must dispose of this case in favor of the defendants. *For if it be conceded that the Act of 1839 is not now operative, and that the Constitution and statutes have changed the law, it is a sufficient answer to say that it cannot operate to divest the defendants of the right which they obtained prior thereto.*"

In *Brinckerhoff* v. *Newark & Hackensack Traction Co.*, 66 N. J. L., 478, it was held that the right to exercise the power of eminent domain passed under a sale of the "property and franchises" of a corporation pursuant to a statute providing that upon such sale the purchasers should become the owners of the property and of the "corporate rights, liberties, privileges and franchises of said corporation" and should thereupon become a new corporation "entitled to all the rights, liberties, privileges and franchises" of the corporation whose properties and franchises had been so sold and conveyed. The Supreme Court of New Jersey said (p. 481):

"While the act does not expressly declare that the new corporation shall have *the right to take lands by eminent domain,* it provides that the corporation organized under it 'shall

be entitled to all the rights, liberties, privileges and franchises of the corporation whose property and franchises have been so sold and conveyed.'

"The Union Traction Company, to whose title the defendant company has succeeded, was incorporated under the Traction Act of 1893, which gives to corporations organized under it the right to take lands necessary for the construction of their lines by condemnation. It likewise gives such companies the right and power to extend from time to time, existing lines.

"This was a valuable right and franchise vested in the Union Traction Company at the time of the sale, and was as much a part of its property and franchise as the right to operate its then completed road."

This decision thus recognizes that the right to exercise the power of eminent domain is in itself a vested property right and franchise. The same ruling was made in *C. & W. I. R. R. Co.* v. *Dunbar*, 93 Ill., 571, 579, and it follows, under the other authorities cited, *supra*, that the plaintiff could no more be deprived of that right than of its other rights and franchises.

In short, the authorities show beyond possible doubt that the rights acquired by the plaintiff—its franchise to utilize the sources of water supply covered by its maps, to lay its pipes under the navigable waters of the State, to acquire land and water by exercise of the power of eminent domain, and to contract with any municipality in the State for the sale of the water to be derived from those sources—were all vested rights of property and contract, entirely removed from the power of the Legislature either to repeal, destroy, or impair them. Every argument and contention that is or can be advanced against the plaintiff's claims

—the argument that its rights were inchoate or merely permissive and were legitimately destroyed by legislative repeal—has been met, considered and conclusively answered in one or another of the decided cases to which we have referred.

Indeed, is it not too much to say with soberness and conviction that unless the principles of law are to be utterly disregarded, unless the repeated declarations and adjudications of our highest Courts, upon which citizens must necessarily rely in moulding their conduct and shaping their business dealings, are to be repudiated, there can be no conclusion other than that the plaintiff here possessed vested rights and franchises, protected by the Constitution and incapable of being destroyed by legislative repeals.

POINT IV.

The acts and proceedings of the defendants, done and carried on under color of authority of State laws, constitute an impairment of the plaintiff's contracts and a taking of its property without due process of law.

The bill expressly avers that, acting under color of an authority claimed by them to be contained in Chapters 723 and 724 of the New York Laws of 1905, the defendants have entered and are now trespassing upon the lands, streams, lakes and ponds covered by and designated on the maps filed by the plaintiff (being the watersheds of Esopus, Schoharie, Rondout and Catskill Creeks for the utilization of which the plaintiff claims a franchise) and have commenced and are now continuing the erection of reservoirs, dams, aqueducts

and other appurtenances of a system of water supply, and intend to utilize said waters; that if the defendants complete the construction of such reservoirs, dams, and other appurtenances and accumulate and store and use said waters in accordance with their plans and avowed intention, "it will be impossible for the plaintiff to take advantage of or use said lands, streams, lakes, and ponds," and the rights and franchises of the plaintiff will be thereby impaired, injured, damaged, and practically destroyed and rendered useless and valueless (Bill, Par. Twenty-ninth and Thirtieth). It is alleged, also, that none of the defendants has taken any step or proceeding to acquire the plaintiff's franchises or paid or offered to pay to the plaintiff any compensation whatsoever for its said franchises or any damages for the impairment or destruction thereof or injury thereto (Bill, Par. Thirty-first).

These allegations leave no doubt that the plaintiff's franchises and contracts are being most seriously impaired and that its property is most assuredly being taken.

But the point was made below that "Chapter 724 of the Laws of 1905 makes ample provision for the ascertainment and payment of compensation to every owner or person interested in any lands taken by the City of New York under that act," and that because the statute thus "provides for the taking of property in a due and orderly manner and makes adequate provision for the ascertainment upon notice and hearing of compensation for all damages, direct or indirect, there is no lack of due process of law." And upon this subject the District Court said:

"If it (the plaintiff) were conceded to have

> some easement or interest in these lands, still the Legislature would have a right to condemn them for public purposes, *Long Island Water Supply Co. v. Brooklyn*, 166 U. S., 685, subject, of course, to the duty of providing for compensation and due process of law (*People v. O'Brien*, 111 N. Y., 1). It seems to me that Sections 12 and 13 of Chapter 724, Laws 1905, satisfy these requirements (*People v. Adirondack R. R. Co.*, 160 N. Y., 225, 238, *et seq.*; *Backus v. Fourth Street Union Depot Co.*, 169 U. S., 557, 568, *et seq.*)."

We have already stated that we do not for a moment question the proposition that all the plaintiff's rights, contracts, and franchises are subject to the power of eminent domain, and, under a lawful exercise of that power, might be taken by the defendants by making just compensation. Consequently, we are not here concerned with the question, which was so important in the *Adirondack case*, whether the scheme of condemnation prescribed in the statutes under which the defendants here are acting is of itself such a mode or method of procedure as will measure up to the requirements of due process of law when lawfully complied with. Our complaint is that even if the defendants *could* condemn the plaintiff's rights and franchises, by taking legal proceedings in accordance with those statutes and paying just compensation, they *have not done so.*

It is no answer to this complaint to say that the statutes prescribe an adequate and constitutional method of acquiring property under the power of eminent domain, when, as here, it manifestly appears upon the face of the bill that *the defendants are actually taking this property without paying just compensation.* For no matter what the statutes may provide, if the defendants

be actually taking the property without making compensation, then such taking is not by due process of law. This was expressly held in *Chicago, B. & Q. R. R. Co.* v. *Chicago*, 166 U. S., 226, where the Court considered the question at length and after full discussion ruled that payment of just compensation for property taken for a public use is an essential element of due process of law.

The Court must, therefore, look beyond the terms of the statute itself, and examine *what action is actually being taken* under color of the authority of those statutes; for a statute fair and legal on its face may be so administered as to amount to a deprivation of constitutional rights.

> *Yick Wo* v. *Hopkins*, 118 U. S., 356, 373.
> *McCabe* v. *A. T. & S. F. Ry. Co.*, 235 U. S., 151, 160.

And, as recently said by this Court, if State statutes

> "upon their face, *or in the manner of their administration*, have the effect to deny rights secured by the Federal Constitution * * * they must fail."
>
> *United States* v. *Reynolds*, 235 U. S., 133, 149.

If, therefore, it appear that under color of statutory authority the plaintiff's property is actually being taken without the payment of compensation, it is obvious that the taking is without due process of law, even though the statute contain provision for the due ascertainment and payment of compensation.

In *Backus* v. *Fourth Street Union Depot Co.*,

169 U. S., 557, cited by the Court below, it was contended by certain property owners whose property was being taken for a public use that they were entitled to have the questions of compensation and the necessity of the taking passed upon in a certain manner, *i. e.*, by a jury of inquest, and it was held that a determination of these questions by any properly constituted tribunal would be sufficient. There is nothing in the case that countenances the idea that mere provision for the ascertainment of the compensation upon notice and after hearing will constitute due process of law, when the hearing is never had and the compensation is never paid. On the contrary, the subsequent case of *Appelby* v. *Buffalo*, 221 U. S., 524, expressly affirms the ruling in *Chicago B. & Q. R. R. Co.* v. *Chicago, supra*, that to take private property without compensation amounts to a deprivation of property without due process of law, and quotes from that decision as follows (p. 530):

> "The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

In recent cases in the New York State Courts injunctions have been granted restraining the taking of easements of light, air, and access, by the erection of elevated railroads in New York City even where the right to condemn the property was unquestioned, the ground of the decision being that to permit the taking without the payment of compensation would be unconstitutional; and that doctrine is precisely applicable here.

> *Rothschild* v. *Interborough Rapid Transit Co.*, 162 N. Y. App. Div., 532.

POINT V.

The defendants have no "special authority from the Legislature" to take the lands and waters to which the plaintiff's franchise relates, and the Legislature has not authorized those lands and waters to be devoted to "some other public use."

The statement of the Court of Appeals in the *Adirondack case* that the filing of a map gave an exclusive right to the land "until the Legislature authorized it to be devoted to some other public use," and its further statement that the *Suburban Rapid Transit Co. case* related simply to the right of a railroad to "hold land already condemned for a public use as against a city seeking to condemn it for another public use *without special authority from the Legislature*," were both greatly relied upon below as constituting limitations upon the extent and duration of the plaintiff's rights; and it was urged that in this case these limitations had become effective because of the statute under which the defendants are proceeding.

We have already stated our interpretation of the *Adirondack case* and will not repeat our views here. But in no view do those expressions aid the defendants.

The defendants are not endeavoring to devote the lands and waters here in question to "some other public use," nor is it pretended that the Legislature has authorized them to be devoted to any use other than for water supply purposes. And the defendants themselves have no "special authority from the Legislature" to take the particular lands and waters here involved.

The statute under which the defendants are act-

ing (L. 1905, C. 524) does not mention these lands or specially authorize the defendants to acquire them. On the contrary, it is therein expressly provided, with reference to the authority therein given to acquire real estate (Sec. 25):

> "The term real estate shall be * * * construed to include all real estate (as the term is above defined) heretofore or hereafter required or used for railroad, highway or other public purposes, *providing the persons or corporations owning said real estate or claiming interest therein, shall be allowed the perpetual use for such purposes of the same of or such other real estate to be acquired for the purposes of this act as will afford practicable route or location for such railroad, highway or other public purpose,* and in the case of a railroad, commensurate with and adapted to its needs; and provided, also, that such persons or corporations shall not directly or indirectly be subject to expense, loss or damage by reason of changing such route or location, but that such expense, loss or damage shall be borne by the City of New York. In case any real estate so acquired, or used for public purposes, is sought to be taken or affected for the purposes of this act there shall be designated upon the maps referred to in the previous sections thereof, and there shall be described in the petition, hereinbefore referred to, such portion of the other real estate shown on said maps and described in said petition, as it is proposed to *substitute in place of the real estate then used for such railroad, highway or other public purposes.*"

Thus, although the defendants are given a general authority to acquire property already devoted to a public use, such authority is expressly made conditional upon providing either for a concurrent use of the property taken or for the substitution of other property in lieu thereof.

The defendants are therefore in the precise position of the City in the case of *Suburban Rapid Transit Co.* v. *Mayor, etc., supra.* They are attempting, under a general grant of the right to acquire lands for water-supply purposes, to take specific lands which are already subject to the planitiff's franchise. The well-settled rule that property already devoted to a public use cannot be taken except by express statutory authority is hence applicable here.

Lewis, Eminent Domain, Sec. 440.
Matter of City of Buffalo, 68 N. Y., 167.
Suburban R. T. Co. v. *Mayor, etc., supra.*
N. Y. C. & H. R. R. R. Co. v. *City of Buffalo,* 200 N. Y., 113.

Conclusion.

The decree appealed from must be reversed, because the suit involves a dispute or controversy as to whether the plaintiff has a contract or property right within the meaning of the United States Constitution, and the District Court has jurisdiction of such a controversy as a Federal Court, whether the plaintiff's claim ultimately be held good or bad.

We respectfully suggest, however, that as it has been necessary to argue and the District Court has actually considered and passed upon the validity of the plaintiff's claim, it is entirely proper and in the interest of justice that this Court should rest its reversal of the decree upon the ground that as a matter of law, assuming the facts alleged to

be true, the plaintiff's claims are well-founded and entitle it to relief.

February, 1915.

Respectfully submitted,
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